

# ALRC 82

## **Integrity: but not by trust alone** **AFP & NCA complaints and disciplinary systems**

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ISBN 0 642 26423 6

Commission Reference: ALRC 82

The Australian Law Reform Commission was established by the *Law Reform Commission Act 1973*. Section 6 provides for the Commission to review, modernise and simplify the law. It started operation in 1975.

# Terms of references

## Australian Federal Police

### COMMONWEALTH OF AUSTRALIA

#### *Law Reform Commission Act 1973*

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- (a) the importance of the Australian Federal Police (AFP) in Australia's law enforcement efforts;
- (b) Australia's obligations under international law, including under -
  - the International Covenant on Civil and Political Rights
  - the Convention on the Elimination of All Forms of Discrimination Against Women
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
  - the Convention on the Rights of the Child;
- (c) the responsibility of the Commonwealth to protect human rights and civil liberties and the need to maintain a proper balance between that protection on the one hand and protection of the community by practical and effective law enforcement on the other;
- (d) Australian Law Reform Commission Reports No. 1 *Complaints against Police* 1975 and No. 9 *Complaints against Police Supplementary Report* 1978;
- (e) the passage of time since the enactment of the *Complaints (Australian Federal Police) Act 1981* (Cth) and any changes in public attitudes towards the accountability of police in that time;
- (f) the attainment of self-government by the Australian Capital Territory; and
- (g) the report of the Senate Standing Committee on Legal and Constitutional Affairs on the *Complaints (Australian Federal Police) Amendment Bill 1994*;

in pursuance of section 6 of the *Law Reform Commission Act 1973* (the Act), at the request of the Minister for Justice and the AFP, HEREBY REFER to the Law Reform Commission for inquiry and report the *Complaints (Australian Federal Police) Act 1981* (Cth) (the Act).

In particular the Commission is to inquire into and report on:

- (a) the complaints and disciplinary system applying to police and staff members of the AFP in its entirety, including all related laws and subordinate instructions;
- (b) whether the Act and associated legislation meets the expectations of the public in terms of police accountability, effectiveness and efficiency;
- (c) the laws, practices and procedures for handling complaints against police in the Australian States and Territories and in comparable overseas jurisdictions;
- (d) appropriate standards for handling complaints against police;

- (e) appropriate ways to handle complaints against police, including through use of mediation and conciliation in cases involving minor complaints;
- (f) the appropriateness of sanctions provided for in the Act and associated legislation, including the forfeiture of superannuation benefits;
- (g) means by which the Government of the Australian Capital Territory can be more involved in cases where complaints or allegations are directed against police and staff members of the AFP under the command of the Chief Police Officer for the Australian Capital Territory or against the practices and procedures applicable to that command;
- (h) any related matters of particular relevance to Australia's external territories; and
- (i) what amendments, if any, should be made to the Act and other legislation applying to police and staff members of the AFP.

IN PERFORMING its functions in relation to the reference, the Commission is to consult widely among the Australian community, particularly in the Australian Capital Territory and Norfolk Island, with the AFP and other relevant federal, State and Territory authorities and with relevant non-government organisations.

THE COMMISSION IS REQUIRED to report not later than 30 June 1996.

DATED 29 March 1995

Michael Lavarch

# National Crime Authority

## COMMONWEALTH OF AUSTRALIA

### *Law Reform Commission Act 1973*

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- (a) the importance of the National Crime Authority (NCA) in Australia's law enforcement efforts;
- (b) Australia's obligations under international law;
- (c) the responsibility of the Commonwealth to protect human rights and civil liberties and the need to maintain a proper balance between that protection on the one hand and protection of the community by practical and effective law enforcement on the other;
- (d) Australian Law Reform Commission Reports No. 1 *Complaints against Police 1975* and No. 9 *Complaints against Police Supplementary Report 1978*;
- (e) the reports of the Parliamentary Joint Committee on the National Crime Authority *Who is to Guard the Guards?: An Evaluation of the National Crime Authority 1991* and *Investigating Complaints Made against the National Crime Authority 1994*;
- (f) terms of reference given to the Commission on 29 March 1995 to inquire into and report on the *Complaints (Australian Federal Police) Act 1981 (Cth)*;

in pursuance of section 6 of the *Law Reform Commission Act 1973* (the Act), at the request of the Minister for Justice and the NCA and with the agreement of the Inter-Governmental Committee on the NCA, HEREBY REFER to the Law Reform Commission for inquiry and report procedures for the investigation and resolution of complaints against the NCA and staff members of the NCA or police officers seconded to the NCA.

In particular the Commission is to inquire into and report on:

- (a) the complaints and disciplinary system applying to police and staff members of the NCA in its entirety, including all related laws and subordinate instructions;
- (b) whether the complaints and disciplinary system meets the expectations of the public in terms of accountability, effectiveness and efficiency;
- (c) appropriate standards for handling these complaints;
- (d) appropriate ways to handle these complaints, including the use of mediation and conciliation in cases involving minor complaints;
- (e) appropriate sanctions to be applied if a complaint is established;
- (f) what laws, if any, should be enacted to give effect to the Commission's recommendations.

The Commission is to consider the particular situation of police officers seconded to the NCA and the appropriateness or otherwise of their being subject to any complaints system established for the NCA rather than to complaints systems for the police services from which they were seconded.

The Commission should undertake this inquiry in conjunction with its inquiry under the terms of reference dated 29 March 1995 referred to above.

IN PERFORMING its functions in relation to the reference, the Commission is to:

- (a) have regard to the laws, practices and procedures for handling complaints against police in the Australian Federal Police (AFP) and in Australian States and Territories and in comparable overseas jurisdictions;
- (b) consult widely among the Australian community, with the NCA, the AFP and State and Territory police services, with other relevant federal, State and Territory authorities and with relevant non-government organisations.

THE COMMISSION IS REQUIRED to report not later than 30 June 1996.

DATED 26/7/95

Michael Lavarch

# Overview

*Integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful.*

Samuel Johnson, *Rasselas* (1759) 41

The Australian Law Reform Commission has reviewed the complaints and disciplinary processes of the Australian Federal Police (AFP) and the National Crime Authority (NCA).

A list of the Commission's recommendations is set out in this report.

Complaints and disciplinary systems are vital in ensuring that law enforcement agencies perform according to high standards of integrity and accountability. They must also support the achievement of the specific objectives of effective and efficient law enforcement.

The Commission considers that a new approach is necessary for complaints and disciplinary processes for the AFP and NCA to ensure that this balance between accountability and effectiveness is properly maintained. The Commission is recommending a single and comprehensive framework of accountability to replace the present fragmented systems.

## Complaints systems

### *Objectives*

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

- 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 Commission has determined that an effective complaints system must also deal specifically with corruption issues and, in response to those issues, provide adequate preventive and proactive measures with effective external scrutiny.

### *Assessment of present systems*

The Commission considers that the current AFP complaints process provided for by the *Complaints (Australian Federal Police) Act 1981* (Cth) fails to meet these objectives for complaints and corruption. The Commission has reached the same conclusion in relation to the NCA complaints process which is tainted by the lack of any formal external scrutiny. These conclusions in respect of the AFP and the NCA are generally supported by the consultations the Commission undertook, the submissions it received and a number of case studies that it examined.

### *Special issues for the NCA*

Consideration of NCA complaints and disciplinary processes is complicated by the diverse workforce of the NCA. NCA staff may fall within one of the following categories:

- those employed under the *Public Service Act 1922* (Cth)
- seconded personnel (eg AFP, State and Territory police officers or other law enforcement officers)
- legal counsel
- task forces (officers of the AFP, State and Territory police services and other agencies may be members of NCA task forces under the NCA Act).

The NCA currently has no legislatively based complaints system. Instead the NCA has an internal administrative arrangement for complaints to be dealt with internally. The NCA often refers complaints about seconded officers or task force members to the home agencies.

The Commission recommends that the NCA Chairperson, members and all staff members should be subject to an NCA complaints system. This single system would provide the clearest line of procedure, accountability and consistency.

Seconded police, consultants, legal practitioners and task force members would only be subject to the NCA complaints procedure in relation to their work for the NCA. For example, Task Force members from a State or Territory agency would only be subject to the NCA complaints procedure in their capacity as a member of that Task Force. The legislation could specify the range of conduct covered by providing that the action that may be subject to the operation of the NCA complaints provisions is that action in performance or purported performance of the person's powers or functions under the NCA Act or action arising directly or indirectly in the course of the person's employment or engagement under the NCA Act.

### *NIIC*

The Commission has concluded that, in order to achieve the proper objectives of the AFP and NCA complaints systems, the level and effectiveness of external scrutiny should be increased. Therefore the Commission has recommended that a new body should be the external complaints and anti-corruption authority for the AFP and the NCA. That new body, the National Integrity and Investigations Commission (NIIC), is specially designed to meet the particular integrity and accountability demands of the AFP and the NCA. It would be an auditor, with full access to all relevant information, of the AFP's and NCA's performances in relation to integrity and accountability. It would replace the Commonwealth Ombudsman in relation to complaints and would be the first external agency introduced to handle NCA complaints.

The NIIC would

- focus specifically on the AFP and NCA
- have two main divisions - the Office of the Commissioner for Complaints and the Office for Anti-Corruption
- have a staff of about 30 with about 15 investigators and be located in Canberra
- have royal commission powers exercisable in relation to issues of integrity and accountability
- be subject to
  - the Privacy Act 1984 (Cth)
  - the Freedom of Information Act 1982 (Cth)

— the Administrative Decisions (Judicial Review) Act 1977 (Cth)

- be accountable under its specific legislation to the Attorney-General with protocols established for monitoring the NIIC's performance and for handling any complaints made against it
- determine categories for complaints according to seriousness and public interest - these categories would act as guidelines for determining the level of NIIC and AFP or NCA involvement in the investigation and handling of particular complaints
- conduct investigations into the most serious complaints and corruption matters
- 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
- ordinarily audit the handling of minor complaints by the AFP or NCA
- audit AFP and NCA anti-fraud and anti-corruption plans and measures
- assist the AFP and NCA in the developing suitable training and education in relation to integrity and accountability
- 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.

#### ***Other recommendations***

Other recommendations are to

- broaden the definition of complaint to include all situations where a person expressly or by implication seeks review of, or challenges, the validity or appropriateness of the conduct of an AFP or NCA officer or of the AFP or NCA as organisations
- remove the current distinction under the AFP complaints legislation between complaints and allegations
- remove any requirement for a person to have any particular interest or standing in a matter to be able to lodge a complaint
- introduce legislation to protect and encourage whistleblowers
- have statutory definitions of complaints investigations outcomes, namely *substantiated*, *unsubstantiated*, *incapable of determination* and *false*
- introduce criminal offences for officers who deliberately fail to record a complaint or who deliberately fail to report suspected criminal offences by officers
- impose a duty on AFP and NCA officers to inform persons under arrest or who are formally interviewed of the existence of the complaints process
- introduce measures to improve the accessibility of the complaints systems, including the provision of information and advertising
- amalgamate the investigative functions of the AFP's Internal Investigation Division (IID) and its Internal Security and Audit (ISA).

## **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 have officers who meet the standards expected and demanded by those agencies.

The AFP has its own disciplinary process provided by the Complaints Act and the AFP Act. The Commission considers that the AFP disciplinary system retains many elements of the traditional para-military disciplinary model of discipline with its quasi-criminal focus. This model is outdated and unsatisfactory.

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, no other categories of NCA staff, including seconded police, come within that Public Service Disciplinary Code. The Commission recommends that the NCA should have its own disciplinary code that should apply to all NCA members and staff. The form and content of the NCA disciplinary code and the extent to which it applies to seconded officers and members of Task Forces should be determined after appropriate consultation with relevant federal, State and Territory agencies.

In the place of this traditional approach to discipline, the Commission is recommending a new managerial model that gives the AFP Commissioner and the NCA Chairperson primary responsibility and decision making for imposing discipline on their personnel.

However, this managerial decision making would be subject to review on the merits by the Administrative Appeals Tribunal (AAT). The one exception to this process of full merits review would be that the AAT would not be able to review decisions by the AFP Commissioner or the NCA Chairperson to terminate an officers appointment for 'loss of confidence', a term which would be statutorily defined.

As a consequence of these recommendations the Federal Police Disciplinary Tribunal (FPDT) which currently has jurisdiction in relation to AFP disciplinary matters would no longer be necessary. The Commission has come to this conclusion on the basis that merits review of managerial decision making would be more readily and effectively carried out by the AAT than the FPDT.

### ***Other recommendations***

Other key recommendations are as follows.

- AFP and NCA supervisors should be able to take action other than formal disciplinary proceedings for minor disciplinary matters (eg issuing caution notices).
- Deductions of superannuation should not be available as a sanction for disciplinary offences (they are currently available in relation to AFP officers for certain disciplinary matters).
- Complainants and officers the subject of disciplinary proceedings should be given proper notification of, and reports on, complaints investigations and disciplinary proceedings.
- The right to seek review by the AAT of a disciplinary decision should be expressly limited to the officer the subject of a complaint and to the Chairperson of the NIIC where he or she is satisfied the penalty imposed is inadequate.
- The AAT should have the right to compel answers and the production of documents when reviewing cases involving the AFP and NCA. Evidence so given should not be admissible in criminal or civil proceedings apart from proceedings relating to contempt or giving false evidence before the Tribunal.
- The AAT should be able to award costs in AFP and NCA disciplinary matters.
- There should be a right of appeal on a question of law from the AAT to the Federal Court.

# List of recommendations

## Chapter 2 - Commission's approach

### Objectives of AFP and NCA complaints systems

1. The main objectives for the AFP and NCA complaints systems are to

- ensure public confidence in these agencies and their complaints systems
- achieve proper accountability of the agencies and their officers
- be fair to complainants and to AFP and NCA officers and staff including taking into account the requirements of natural justice and privacy considerations
- be credible to the agencies and their officers and staff
- be accessible to the community
- promote appropriate standards of conduct, ethics and integrity from officers and staff and their agencies
- provide the appropriate response, particularly the appropriate level of investigation, to the full range of complaints, from minor to serious, including those involving corruption
- provide feedback to the agency about individual officers and staff, agency practices, procedures and operations
- take into account appropriately other agency priorities such as law enforcement operations
- be timely in process and outcome
- use resources efficiently.

These objectives should be included in an objects clause in the new legislation. They should also be incorporated in AFP and NCA codes of conduct and corporate goals and practice where appropriate.

### Ensuring effective management responses

2. Complaints forms should contain a section on suggested remedial action and the consequences for management in relation to the particular complaint including implications for policies, practices and procedures. There should also be a record of follow-up and implementation.

3. AFP and NCA managements in consultation with the NIIC should consider how best to incorporate into their management processes proper consideration of complaints and misconduct including

- action in relation to specific officers and staff members
- management issues arising from complaints and misconduct
- implications for policies and practices (eg personnel selection, training, supervision, rules and procedures)
- regular reviews of the complaints and corruption systems and the disciplinary process.

4. The NIIC in consultation with the AFP and NCA should consider what information about complaints, corruption and discipline should be contained in their respective Annual Reports. The NIIC may consider establishing guidelines and standards. The Commission would expect that Annual Reports would include useful information on the incidence and nature of complaints and any action taken including an analysis of trends and managerial responses.

5. The NIIC should develop as part of its protocols with the AFP and the NCA a process for monitoring the implementation of its recommendations by the agencies.

## **Chapter 4 - A complaints model for the AFP**

### **The National Integrity and Investigations Commission**

6. A new single agency to be known as the National Integrity and Investigations Commission (NIIC) should be established to investigate or manage/supervise the investigation of complaints against the AFP and the NCA.

## **Chapter 5 - A complaints system for the NCA**

### **A complaints system for the NCA**

7. The NCA should have a formal complaints system established under legislation that provides effective external participation and scrutiny.

8. There should be one uniform NCA complaints system applying to NCA members and all its staff that is, to (a) members and the Chairperson (b) staff employed under the Public Service Act, (b) seconded staff (c) consultants (d) legal practitioners and (e) members of task forces.

9. The National Integrity and Investigations Commission should provide external scrutiny of, and participation in, the system of complaints against the NCA and its staff.

10. The IGC and the PJC should not be part of the NCA complaints system.

11. There should be an exception to the NCA Act secrecy provisions so that

- it does not apply to a person making a complaint to the NCA or to the NIIC or to any person designated to be able to receive complaints about the NCA, and
- the appointed investigator of a complaint has full access to relevant information.

The Chairperson of the NIIC should have access to all information that the AFP and NCA has and may request information from each agency which is to provide it. The NIIC Chairperson should be in the same position as the AFP Commissioner or the NCA Chairperson in respect to access to information in respect to their agencies.

12. The NCA should have permanent arrangements in place for the handling of complaints and anti-corruption and anti-fraud plans and measures. The NCA should determine in consultation with the NIIC the best way to implement a permanent structure, including whether there should be a special unit.

## **Chapter 6 - The NIIC's role, structure and powers**

13. The new legislation to establish the NIIC should include complaints provisions for both the AFP and the NCA. The Act should be called the National Integrity and Investigations Commission (Australian Federal Police and National Crime Authority Complaints) Act.

The Act should be drafted so that it is easy for a reader to identify and follow the complaints process.

14. The NIIC should have two main divisions

- the Office of the Commissioner for Complaints and
- the Office for Anti-Corruption.

15. The NIIC would have a full-time Chairperson, a full-time Commissioner for Complaints and at least one part-time Commissioner.

### **Miscarriages of justice**

16. 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 who may have been adversely affected by it. It should also include notifying relevant authorities, for example, the Attorney-General, the DPP and any person that may have been adversely affected by the suspected corruption.

17. Consideration should 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.

### **NIIC's powers**

18. The NIIC should have conferred on it the full range of investigative and inquisitorial powers of a royal commission.

19. The NIIC's entry and search powers should accord with current Commonwealth policy as reflected by Part 1AA of the *Crimes Act 1914* (Cth).

20. The NIIC's power to punish for contempt should be drafted in such a way as to proscribe specific conduct rather than by attributing a general contempt power to the NIIC.

21. The NIIC Act should provide that the NIIC has the power of control and direction of any investigation about the AFP or the NCA in relation to a complaint or corruption.

22. The NIIC should have the power to make recommendations, give opinions and make assessments to the AFP or the NCA on the basis of its investigations or those of agencies which it has managed or directed.

23. The NIIC should have a power to make recommendations to provide a specific remedy for a complainant where it reports that a complaint is substantiated including

- an apology or explanation
- financial compensation or restitution of property
- a change in decision or course of action.

24. The NIIC should be empowered to inquire into a matter relating to the AFP or the NCA that is referred to it by the Attorney-General.

### **Confidentiality provision**

25. The Chairperson of the NIIC, its members and staff should be subject to a confidentiality provision. It would be an offence for them to make unauthorised disclosures of information obtained in the course of their functions or exercise of powers.

## **Duty to report misconduct**

26. An AFP appointee should face a criminal charge in relation to a wilful or intentional failure to report as soon as practicable, when that appointee was under a duty to do so, the commission of, or a reasonable suspicion of, the commission of a criminal offence by an AFP appointee. There should be a defence that the person had a reasonable belief that there was no obligation upon him or her to report the matter or that he or she had a reasonable belief that he or she had discharged the obligation. A negligent or careless failure should constitute a disciplinary offence with the same excuse of reasonable belief.

The failure to report a breach of a disciplinary rule or a breach of the law other than a criminal law when under a duty to do so should be the subject of a disciplinary proceeding. The excuse of reasonable belief should also apply.

The same provisions should apply to the NCA.

Similar provisions should apply to NIIC officers so that they have a duty to report in relation to their staff and also in relation to AFP and NCA officers.

## **Accountability**

27. The NIIC should be accountable to the federal Attorney-General who would have portfolio responsibility for NIIC thus complementing the Attorney's portfolio responsibility for the AFP and NCA.

## **Duty to report a 'reportable matter'**

28. Every AFP appointee other than the AFP Commissioner and every NCA staff member other than the NCA Chairperson would be obliged to report a 'reportable matter' as soon as practicable to the Commissioner of the AFP or the Chairperson of the NCA respectively and to the NIIC.

## **Complaints against the NIIC**

29. The NIIC Act should provide that the Chairperson of the NIIC must report to the Attorney-General any complaint of misconduct against the NIIC or its staff. The Attorney-General's Department and the NIIC as part of their protocol should establish procedures for the reporting of complaints and action that should be taken in response including monitoring and review.

## **Intelligence database**

30. The NIIC should have an intelligence database that would collect, analyse and disseminate information particularly about criminal activities including corruption.

31. The NIIC database should be designed and maintained after consultation with the AFP, the NCA and other relevant agencies. Duplication of resources and effort should be avoided and appropriate protocols for the exchange of information developed.

## **Privacy Act and Freedom of Information Act to apply**

32. The NIIC should be subject to the provisions of the *Privacy Act 1988* (Cth). The Privacy Commissioner should audit the information handling process of the NIIC and report to the Attorney-General. The *Freedom of Information Act 1982* (Cth) should also apply.

## **Research and policy role**

33. The NIIC should keep under continuous review trends relating to relevant aspects of AFP and NCA conduct coming to its notice and in particular trends relating to complaints and corruption. It should also monitor AFP and NCA cultures and undertake research relating to complaints and corruption and make recommendations on those matters.

34. The outcomes of the research and policy work of the NIIC should be published at large except where operational security or privacy laws dictate otherwise.

### **Developing a national scheme**

35. A body such as the Australian Police Ministers' Council should consider developing a national scheme for investigations including accreditation for investigators with appropriate skills and integrity checks and arrangements for the interchange or sharing of information, facilities, equipment and other resources.

### **Potential for extended jurisdiction**

36. If the NIIC is established, active consideration should be given to the proposal that its role should be extended to other aspects of federal law enforcement.

### **Developing national standards**

37. Consideration should be given to developing national standards for law enforcement complaints and disciplinary standards. This process could be begun through bodies such as the Australian Police Ministers' Council.

### **Intercept audit function**

38. Consideration should be given to the NIIC auditing telephone intercepts conducted by the AFP and the NCA.

## **Chapter 7 - The NIIC's investigative procedures and relationship with the AFP and NCA**

### **Categories and guidelines**

39. The NIIC should issue guidelines about investigative procedures for different categories of complaints. The Commission considers that the main categories should be

- Category A - serious criminality, corruption and significant public interest
- Category B - misconduct
- Category C - customer service matters
- Category D - internal management matters.

### **Investigative procedures**

40. The NIIC should have different investigative procedures depending on the category of the matter.

#### ***(i) Category A for the AFP***

For Category A complaints involving the AFP the NIIC should investigate the matter itself with the power to request that the AFP provide personnel and/or facilities and equipment.

#### ***(ii) Category A for the NCA***

For Category A complaints involving the NCA the NIIC should investigate the matter itself with the power to request that the NCA provide personnel and/or facilities and equipment. Where it appears to the NIIC that a complaint against the NCA or a staff member is a Category A complaint that goes *beyond the conduct of AFP seconded personnel*, the NIIC would consult with any State or Territory agency whose staff were involved as to the appropriate course of action including the matter's investigation.

Preferably the NIIC and all relevant State and Territory agencies should develop memoranda of understanding on the process of investigation of complaints involving the NCA and seconded staff, consultants or joint task force members.

One option that should be available and specified in the legislation would be the establishment by the NIIC of an Investigatory Board to assist it in investigating the complaint or aspects of the complaint. The legislation should not prescribe the composition of any Board. This would be a matter for the NIIC and the relevant agencies to determine in the particular circumstances.

***(iii) Category B for the AFP***

For Category B complaints involving the AFP the NIIC would

- require the AFP Commissioner to conduct an internal investigation with no use of the NIIC's coercive powers but subject to the management or supervision of the NIIC, or
- establish a joint investigation with the AFP and, where appropriate, including members of other Commonwealth or State agencies, particularly law enforcement agencies - these investigations would be subject to the appropriate level of either management or oversight by the NIIC and where necessary the NIIC could use its coercive powers, or
- investigate the matter directly itself (with its full range of coercive powers available) where it considered that the nature of the complaint was such that it ought to conduct the entire investigation by itself - this would be the only option available if the complaint concerned the Commissioner of the AFP or a Deputy Commissioner, or
- refer a complaint that concerns the AFP generally to the Commissioner of the AFP for consideration and response.

***(iv) Category B for the NCA***

For Category B complaints involving the NCA the NIIC would

- refer a complaint about the actions of a staff member to the Chairperson of the NCA for investigation and report with no use of the NIIC's coercive powers but subject to the management or supervision of the NIIC, or
- conduct the investigation but with involvement from the NCA and, where appropriate, members of other Commonwealth or State agencies, particularly law enforcement agencies - these investigations would be subject to the appropriate level of either management or oversight by the NIIC and where necessary the NIIC could use its coercive powers, or
- investigate the matter directly itself (with its full range of coercive powers available) where it considers that the nature of the complaint is such that it ought not be investigated internally by the NCA in the first instance - this would be the only option available if the complaint concerned the Chairperson of the NCA or a member, or
- refer a complaint that concerns the NCA generally to the Chairperson of the NCA for consideration and response.

***(v) Categories C and D***

Category C complaints (customer service) would be dealt with by informal resolution provided by the AFP or the NCA. The NIIC would be advised of all such complaints and their resolution and have powers of review and audit.

Category D complaints (internal management matters) would, if they came to the attention of the NIIC, be referred back to management for appropriate action. The NIIC would be able to review any decision taken by management.

### **Resolving major conflicts**

41. The NIIC legislation should provide that the Commissioner of the AFP and the Chairperson of the NCA may serve a certificate on the Chairperson of the NIIC to the effect that the Commissioner or the Chairperson (as appropriate) is satisfied that a course of action contemplated or undertaken by the NIIC would seriously prejudice, or is seriously prejudicing, an operation of the AFP or NCA and that appropriate consultation with the NIIC has not resolved this concern.

The legislation should also provide that, where the Commissioner or the Chairperson issues such a certificate, the Chairperson of the NIIC shall not undertake the relevant action or continue it unless satisfied that the need for action outweighs the concerns of the AFP Commissioner or NCA Chairperson.

The Chairperson of the NIIC would be required to report the service of a certificate immediately to the Attorney-General and report on the issue of any certificates, and the response of the NIIC to those certificates, in each NIIC Annual Report, subject to privacy considerations and operational security requirements.

### **Time limits**

42. There should be time limits for action in relation to complaints. These would be set out in guidelines issued by the NIIC.

### **Role of the IID**

43. The IID and ISA should be amalgamated to form a new IID.

44. The objectives of the IID should be provided for in the complaints legislation.

45. There should be no statutory requirement that only the IID can be involved in, or conduct, complaints or corruption investigations concerning the AFP. This recognises that there may be occasions where it would be more appropriate to use all or some non-IID personnel.

46. The AFP should continue to improve the calibre, training and status of the IID.

## **Chapter 10 - Disciplinary systems for the AFP and NCA**

### **Options for AFP management**

47. The AFP management should continue to have a wide range of options available to it to deal with inadequate or poor performance or misconduct. This should include fixed term appointments, an effective performance appraisal system and the capacity to retire a person as provided for under s 26E.

48. Section 26E should be amended so that merits review for decisions under that section relating to failure to meet employment standards would be provided by the AAT.

Section 26E should also be amended to refer to decisions by the Commissioner to retire a person that is based on 'loss of confidence' by the Commissioner in an appointee. 'Loss of confidence' should be defined as situations where the Commissioner is of the view based on reasonable grounds that the ethics, character, integrity or honesty of the appointee is such that he or she is no longer suitable for service in the AFP. In situations where the s 26E decision is based on a judgement of 'loss of confidence' the AAT should be restricted to reviewing decisions by the AFP Commissioner as to whether any compensation should be provided and, if so, its amount. The AAT would not be able to order the reinstatement of the person the subject of a decision of loss of confidence.

There would be no merits review of decisions made under s 26F.

### **Options for NCA management**

49. Consideration should be given to the NCA having its own employment regime including fixed term appointments, a power similar to s 26E (expanded to include 'loss of confidence') and effective performance appraisal. Any equivalent to a s 26E provision should be subject to merits review by the AAT as recommended for s 26E itself (see rec 48).

### **Merits review by AAT**

50. The AAT should provide review on the merits of misconduct decisions by the AFP.

### **NCA misconduct code**

51. The NCA should have its own misconduct code that applies to all NCA members and staff. The preferable method for achieving this is for the NCA to enter into agreements with the relevant home agencies of seconded officers or joint task force members to enable those officers to be subject to the misconduct system of the NCA in relation to their actions or purported actions under the NCA Act or the exercise of their powers and functions under the NCA Act.

### **AAT review of NCA misconduct decisions**

52. The AAT should provide merits review of NCA misconduct decisions.

## **Chapter 11 - Consequences of administrative review by the AAT**

### **Standard of proof**

53. The appropriate standard of proof should be in disciplinary review proceedings the 'balance of probabilities.'

### **Modified right to silence**

54. There should be no right to silence during investigations by the NIIC. However, as is currently the case for investigations by the IID, no information obtained under a direction should be admissible against the member in any civil or criminal proceeding other than misconduct proceedings. The IID's power to compel answers from a member of the AFP during an investigation should continue.

55. The NIIC when conducting a hearing should have the power to compel answers and the production of documents. Such information should not be admissible in evidence against the person in criminal or civil proceedings but should be admissible in misconduct proceedings.

56. The AAT should likewise have the same powers as those investigating complaints, that is, to compel answers and the production of documents when reviewing cases involving the AFP and NCA. However, evidence so given should not be admissible in criminal or civil proceedings apart from proceedings relating to contempt or giving false evidence before the Tribunal.

### **Derivative use**

57. A immunity against derivative use should be included in the immunities given in relation to the abrogation of the privilege against self incrimination for the IID and NIIC investigations and hearings and during AAT review.

58. There should be no prohibition against the use of compelled evidence in proceedings to which the party from whom the evidence was compelled is a witness.

## **Proceedings normally to be public**

59. Review of misconduct decisions by the AAT should be in public unless the AAT determines otherwise as currently provided for under the AAT Act s 35.

## **Parties to a decision**

60. The right to seek review by the AAT of a disciplinary decision should be expressly limited to the officer the subject of the action and to the Chairperson of the NIIC where he or she is satisfied that the penalty imposed is inadequate.

## **Availability of administrative review**

61. There should be no limit on the availability of review by the AAT according to the type of sanction imposed. However, there would be a filing fee for making an application for review. The amount of the fee should be determined by considering such fees in other similar jurisdictions, particularly the AAT's jurisdiction.

## **Costs**

62. The legislation for the AFP and the NCA should provide that the AAT may award costs. It should also provide that as a general rule each party should bear their own costs but also specify the following exceptions where the AAT

- makes a decision more favourable to the applicant - then the AAT should be able to order that all or part of the costs of the proceedings should be paid by the respondent
- is satisfied that the application for review is wholly unreasonable or frivolous - then it may order that the applicant pay all or part of the costs of the proceedings
- determines to impose its own disciplinary and case management costs orders to enhance compliance with AAT procedures
- is satisfied that an order for costs is necessary to permit the party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

## **Individual liability for costs**

63. There should be no statutory discretion for the AFP Commissioner or the Chairperson of the NCA to be able to require an individual officer to pay all or part of the agency's legal costs where the Commissioner or Chairperson is satisfied that the officer's misconduct was intentional or reckless and led to charges against an individual being dismissed or for a person being wrongly charged in the first place.

## **Legal assistance**

64. The current AAT provision about legal assistance should apply for the review of AFP and NCA misconduct decisions.

## **Appeals**

65. There should be a right of appeal on a question of law to the Federal Court in accordance with the existing procedures of the AAT.

## **Removal of inappropriate terminology**

66. The terms 'discipline' or 'disciplinary' should be removed from the legislation and the term 'misconduct' substituted. All language that has usage in criminal matters should also be avoided in the legislation such as 'guilt' and 'offences' and 'charges'.

## **Need for negligence proceeding**

67. A misconduct proceeding that an appointee was negligent or careless in the discharge of his or her duties should be included in the AFP misconduct legislation.

## **Chapter 12 - ADR, sanctions and provision of information**

### **Principles for ADR**

68. The NIIC in consultation with the AFP and NCA and peak ADR bodies should develop a series of principles and guidelines to determine the use of ADR for complaints. This should include

- in consultation with NADRAC and other peak bodies developing appropriate definitions of the types of resolution to be used including informal resolution and mediation
- a policy that mediators should be independent and have appropriate training
- guidelines about the use of ADR for different types of complaints including sexual harassment cases
- guidelines about time limits but they should be subject to flexibility where there is genuine evidence of a matter being resolved.

### **Use of informal resolution**

69. The use of informal resolution for appropriate cases as determined by guidelines developed by the NIIC and the AFP and the NCA should be encouraged. Its use and effectiveness should be monitored and audited by the NIIC.

### **Should ADR be compulsory in any case?**

70. Complainants should not be required to agree or be pressured into agreeing to any form of ADR. The officer's consent for informal resolution of minor matters should not be required. In all other cases the officer's consent for participating in ADR should be necessary.

### **Admissibility**

71. Statement 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.

### **ADR and official records**

72. The AFP and NCA should keep records of both referral to ADR and also the outcome of the ADR process. Such records might be kept on performance review documents rather than personnel files but there must be a co-ordinated system that provides a full employment history and profile.

### **Time limits**

73. Any time limits imposed on the alternative dispute resolution process should be flexible to allow for situations where there is genuine evidence of movement between the parties.

## **Conferencing**

74. The AFP and NCA should consult with peak bodies about the use of conferencing in these areas and if it is considered a worthwhile option to explore for some categories of complaints should consider a feasibility study with appropriate guidelines and reporting.

## **Power of suspension**

75. The power of suspension should continue with the following additional elements

- the AFP Commissioner should be able to approve where appropriate an appointee undertaking paid employment during the period of the suspension
- immediately upon being suspended, an appointee must surrender his or her certificate of identity, uniform and equipment issued to him or her for the performance of his or her duties
- an appointee who does not surrender the above things is guilty of an offence and a warrant may be issued to search for those things and to seize them
- an appointee who has been suspended must comply with an order to return temporarily to work - a failure to comply would be an offence
- an appointee who is suspended must not, while on suspension, enter any AFP premises, other than those areas available to the public, unless under a direction to do so - a penalty would apply to a breach of this requirement.

## **Dealing with minor misconduct**

76. For minor cases of misconduct, supervisors and managers should be able to take positive, direct and immediate responses including requiring attendance at counselling or training programs or issuing Caution Notices. These should be able to be issued on the spot. A failure to respond to these lower level measures may result in a misconduct proceeding being commenced.

The penalty of admonishment should be removed from the regulations.

## **Telegraphing penalties**

77. The AFP Commissioner should have a discretion to advise an AFP appointee, who is the subject of a disciplinary proceeding, of the penalty, or the range of penalty, that the Commissioner would impose if he or she were to find that the action against the officer was sustained.

The legislation should provide that the AFP appointee who is the subject of the action is able to request the Commissioner to exercise that discretion. The Commissioner should determine in a particular matter to what extent the penalty will be specified. The Commissioner should be bound by any indication given if the matter proceeds to the determination of the penalty. No inference as to responsibility on the part of the appointee should be able to be drawn from the fact that the appointee has sought an indication of penalty in any matter where that appointee subsequently contests the proceeding.

## **Sanctions**

78. The following sanctions should be available to the Commissioner in all situations where a misconduct proceeding is proved

- reprimand
- counselling, training or retraining

- fines
- reduction in rank or seniority
- reduction in remuneration.

79. Regulation 22(2) of the AFP (Discipline) Regulations should be amended to ensure that the Commissioner has access to the full range of sanctions in all cases.

### **Superannuation orders should not be available**

80. Superannuation orders should not be available as a sanction for a misconduct proceeding or under s 26F of the AFP Act for serious misconduct. Consequently s 49 of the AFP Act should be repealed.

### **Expungement**

81. There should be no statutory provision for the expungement of misconduct proceedings.

### **Reporting to complainants about investigations**

82. Complainants and officers the subject of a complaint should be given regular reports on the progress of any investigation. This should be subject to, particularly in the case of reporting to the officer, any necessary protection of the privacy and confidentiality of the complainant and any measures necessary to protect operational security.

Reports should contain sufficient information for a complainant to understand and follow the course of the investigation and decision-making process. Where a complaint is not investigated or substantiated the reasons for this should be provided to the complainant. That might involve for example, an explanation of the standard of proof that applies.

### **Contact officers**

83. The NIIC, the AFP and the NCA should designate a contact officer for a complainant in respect of each individual complaint. That person would be responsible for periodically reporting to the complainant about the progress of the investigation, the reasons for any significant delay and for answering any direct inquiries from the complainant. One possibility is an obligation of reporting at least monthly. This could be done where appropriate by telephone.

### **Reporting on misconduct proceedings**

84. The AFP and NCA should advise complainants that disciplinary or criminal action has been or is to be taken against a member arising out of that complainant's matter. Complainants should also be informed of the outcomes of those proceedings or actions and wherever possible this should be done in person or verbally.

Officers the subject of the complaint should also receive similar notification.

85. The AFP and the NCA should disseminate widely information about the results of proceedings throughout their respective organisations subject to appropriate protection of the identity of complainants. For example, this could be done by using gazettes, in-house information bulletins and notice boards.

### **Legislative structure**

86. The AFP misconduct regulations should remain under the AFP Act.

87. The misconduct provisions to be drafted for the NCA should be provided for under the NCA Act.

## **Chapter 13 - Anti-fraud and anti-corruption plans and measures**

### **Integrity testing**

88. The AFP and NCA in consultation with the NIIC should each develop a program for integrity testing, including whether it is to be targeted or force wide, what form it will take and how frequently it should be carried out. In developing these programs there should be consultation with the Federal Privacy Commissioner, the Federal Disability Commissioner and other relevant bodies to ensure that any integrity tests are consistent with Federal legislation. Due regard must also be paid to the law relating to entrapment.

### **Need for NCA anti-corruption plan**

89. The NCA should develop an anti-corruption plan that includes a risk assessment for corruption and appropriate integrity testing of all staff. The NIIC should be involved in developing and monitoring AFP and NCA anti-corruption plans.

### **NIIC's role in anti-corruption and anti-fraud plans**

90. The NIIC should regularly consult with the AFP and the NCA about their anti-fraud plans and anti-corruption plans. The NIIC would be empowered to conduct random audits of all aspects of the process and to make recommendations about these systems. The NIIC would include in their annual reports to Parliament information about the AFP and NCA strategies and would report on the results of its auditing.

The AFP and the NCA in developing and reviewing these measures and strategies would need to develop appropriate information links with the NIIC.

### **Avoiding duplication**

91. The NIIC and CLEB should enter into a protocol to avoid any duplication of roles in relation to anti-fraud policies of the AFP and the NCA.

### **Training**

92. The NIIC should play a significant role in assisting the AFP and NCA to develop appropriate training in relation to integrity and accountability and the working of their new complaints systems.

### **Articulating rights**

93. The AFP and the NCA should have a document that is accessible to both their staff and to the general public that sets out the rights and obligations of staff and the public in relation to making and resolving complaints. This could be part of a broader code of conduct or a mission statement. A breach of the code or statement would not confer any legal right.

### **Developing a national strategy**

94. The Commission endorses the measures taken so far, such as the Australasian Policing Strategy, to develop a national strategy to ensure the integrity and competency of Australian law enforcement agencies. The national strategy should include standards for recruitment, training, policy and procedures and data systems.

### **Developing a regional strategy**

95. The Commission endorses the AFP proposal for a regional strategy against law enforcement corruption and recommends that this strategy be further developed.

## **Chapter 14 - Scope of complaints systems**

### **Definition of 'complaint'**

96. A 'complaint' should be defined to include all situations where a person expressly or by implication seeks review of, or challenges, the validity or appropriateness of the conduct of an AFP appointee or of the AFP as an organisation.

### **Interagency communications**

97. Under its guidelines the NIIC should be able to declare that interagency communications are not complaints unless one of the agencies requests that the communication be dealt with as a complaint under the Act. The same discretion should apply to matters raised in court or tribunal proceedings.

### **Definition of complaint for NCA**

98. A similar definition of complaint should be adopted for the purposes of the NCA.

### **Removal of the distinction between 'allegations' and 'complaints'**

99. In the definition of 'complaint' in recommendation 96, 'Conduct' should be defined to include any action or inaction (or alleged action or inaction):

- whether or not it also involves non-AFP participants
- whether or not it occurred while the AFP appointee was officially on duty.

100. The distinction between allegations and complaints should be abolished with matters currently defined as allegations under AFP General Order 6 to be regarded as complaints.

### **Internal management matters**

101. The NIIC should have a discretion to refer matters that relate solely to internal management back to the AFP or NCA for investigation and resolution.

102. In conjunction with the AFP and NCA the NIIC should draft a set of guidelines which deal with the matters that will be referred back to the AFP and NCA.

### **Discretion not to investigate**

103. Each of the discretions contained in s 24 of the Complaints Act should be available to the NIIC although the time limit in s 24(1)(a) should be extended to two years.

### **Who may be subject to a complaint?**

104. All employees, temporary employees, secondees and consultants of the AFP should be covered by the complaints legislation.

### **Collective action**

105. The Act should provide that a complaint can be about the AFP as an organisation or about the collective action of the AFP.

### **Who should be able to complain?**

106. The legislation should not require persons or organisations to have any particular standing to make a complaint. The current requirement of 'sufficient interest' should be removed.

## **Organisations or corporate bodies may complain**

107. The legislation should specify that organisations or corporate bodies may lodge a complaint in the same way as individuals.

108. The legislation should expressly allow complaints by organisations on behalf of individuals but the legislation should not specify any organisation.

## **Agency**

109. The legislation should not specify a requirement of proof for an agent to lodge and proceed with a complaint.

## **Should anonymous complaints be accepted?**

110. Anonymous complaints should continue to be accepted. There should not be any legislative prescription as to how they should be treated or in what circumstances they should be investigated.

## **No specific discretion necessary for anonymous complaints**

111. The NIIC does not require a specific discretion not to investigate anonymous complaints as the discretion to determine that an investigation is not warranted in all the circumstances is sufficient.

## **Recording of complaint outcomes**

112. The current complaint outcomes of 'substantiated', 'not substantiated', 'incapable of determination' and 'conciliated' should be retained but with the additions of the category of 'deliberately false' and the option of 'substantiated - no fault'.

## **Options for investigations outcomes**

113. The options for investigation outcomes for complaints should be provided for in the legislation and each outcome should be statutorily defined.

## **False complaints**

114. The false complaints offence should be retained but should be amended to allow a court on conviction of a person to award the costs of any investigation into the false complaint against that person.

## **Victimisation of complainants**

115. The offence of victimisation should be retained under the NIIC Act and should also apply to complaints concerning the NCA.

## **AFP and NCA secrecy provisions**

116. The secrecy provisions in the Complaints Act s 87 should be redrafted to ensure that information relating to appointees does not need to include information identifying the complainant. The legislation should provide that information relating to appointees, including complaint investigation details, should be available for defined purposes within the AFP as discussed above, but that personal information identifying the complainant should not be disclosed without the consent of the NIIC.

Similar provisions should apply to the NCA.

## **Protection and encouragement of whistleblowers**

117. The Commission supports legislation to protect and encourage whistleblowers. This should cover all Commonwealth agencies including the AFP and the NCA. The legislation should be enacted as a matter of priority.

118. The NIIC should assist the AFP and NCA in developing and reviewing whistleblower policies and programs.

## **Avoiding disciplinary action**

119. The NIIC Act should include an amended equivalent to s 52 of the *Complaints (Australian Federal Police) Act*. The provision should ensure that the Commissioner's power to defer a resignation is available where the Commissioner has initiated an action for misconduct by serving the appointee with notice in writing of the initiation of that action or where a formal investigation into the appointee's conduct has been commenced by the NIIC or at its direction.

## **Powers in relation to ex-staff**

120. The NIIC should have power to investigate or deal with conduct even though an AFP appointee or NCA staff member has ceased to be an AFP appointee or a NCA staff member.

## **Provision of AFP members' name and address upon request**

121. Officers should be under a duty to provide their names and work addresses on request where the person requesting the information indicates that he or she wishes to make a complaint. However, AFP officers should have a discretion not to provide their names or addresses where they believe on reasonable grounds that to do so would jeopardise their safety or the safety of others or jeopardise operational security. The requirement for officers to wear numbers when they are in uniform should be extended to apply to all officers and the numbers should be permanently affixed.

## **Medical examinations**

122. The AFP should liaise with the Victorian Institute of Forensic Medicine and any similar specialist services to assist in establishing medical procedures for complainants including:

- services for the investigation process
- the training of medical practitioners in this role and
- the provision of expert opinions to both investigators and the courts.

These medical procedures should include developing a pro-forma report for medical practitioners asked to examine a person who has complained about assault or other mistreatment by the police or any other law enforcement officer. In the event that a complainant chooses their own doctor, the doctor should be provided with the best possible information which might assist in the determination of the complaint investigation.

## **Vicarious liability**

123. The operation of s 64B should be extended to cover staff members as well as members. The section should be amended to make it clear that the corrupt activities of a member do not fall within the definition of the performance or purported performance of duties.

## **Chapter 15 - Processing complaints**

### **Receiving complaints**

124. The legislation should specify that complaints can be lodged with the NIIC, the Commonwealth Ombudsman, the AFP, the NCA and the NIIC. The complainant would be able to nominate an agent to act on his or her behalf.

### **Complaints lodged with Ombudsman**

125. The legislation should specify that complaints lodged with a Commonwealth Ombudsman's office should be forwarded to the NIIC within 48 hours of receipt. Confidentiality obligations should also apply.

### **Other possible reception points**

126. Consideration should be given to State and Territory anti-discrimination bodies, ICAC, the CJC and the NSW PIC as well as other State and Territory external agencies for handling police complaints as possible reception points for complaints against the AFP and the NCA. These bodies should be consulted as to their availability and capacity.

### **Methods of making complaints**

127. Written and oral complaints should continue to be accepted. Where a complaint is made orally the NIIC, the AFP, the NCA or any other formal recipient should be entitled to require the complainant to reduce the complaint to writing at any time or to provide sufficient information so that the complaint may be reduced to writing.

### **Complainants in custody**

128. The provisions of the Complaints Act relating to complaints made by people in custody should be retained.

### **Recording complaints**

129. The current provisions for particulars required should be maintained but with the addition of management action taken in response to the complaint.

### **Additional information from complainants**

130. The collection of personal information relating to complainants should be collected through surveys and other research processes from complainants on a voluntary basis only. Survey and research work might include information such as

- the complainant's sex
- whether the complainant is a juvenile
- the language spoken at home
- the ethnicity of a complainant
- whether the complainant is Aboriginal
- whether the complainant is disabled.

Any request for information should be explained to the complainant along with an explanation of the reason why the information is being collected and any persons or agencies to whom the information might be disclosed.

131. No further details of complainants, AFP appointees or the complaint itself should be specified in the legislation.

### **Recording complaints**

132. The recording of complaints by an officer who is under a duty to do so should be a legislative requirement. A deliberate failure to comply with the duty to record a complaint should be a criminal offence, while a negligent or careless failure to comply with the duty to record a complaint should be a specific disciplinary offence. A defence should be available where the person had a reasonable belief that there was no obligation upon him or her in the circumstances or he or she had discharged the obligation.

### **Information and advertising**

133. The NIIC in consultation with the Commonwealth Ombudsman should conduct advertising and information campaigns in innovative and accessible ways targeting youth, women, gays and lesbians, Aboriginal and Torres Strait Islanders, people from non-English speaking backgrounds and the socially disadvantaged. The NIIC should ensure that its campaigns are conducted both in written and oral forms so that those with literacy problems are not excluded.

### **Greater accessibility**

134. The Commissioner for Complaints should

- operate a hotline for complaints against the AFP and the NCA
- have an Aboriginal and Torres Straits Islander liaison officer and
- should conduct outreach programs directed at specific ethnic groups and other groups with special needs.

### **A duty on the AFP to provide information**

135. There should be a legislative duty on police to inform persons under arrest or formally interviewed by the police of the existence of the complaints process. This information should be conveyed to the person by a non-involved supervising officer or commissioned officer. Part 1C of the *Crimes Act 1914* (Cth) should be amended to include this duty.

## **Chapter 16 - Special needs of the territories**

### **The ACT**

136. The NIIC Act should allow the AFP or the NIIC to make recommendations or to report to the ACT Attorney-General and the Legislative Assembly where the complaint or matter relates to ACT policing (subject to privacy considerations).

137. A protocol should be established for allowing the ACT Attorney-General to be advised as soon as practicable by the AFP or the NIIC of any complaint about ACT policing that raises significant public interest for the ACT ( subject to privacy considerations).

138. Information and analysis about trends in complaints against the AFP should be provided annually by the AFP and the NIIC to the ACT Attorney-General and, through him or her, the ACT Legislative Assembly.

## **Jervis Bay**

139. The NIIC should arrange with the Department of the Environment, Sport and Territories for the Jervis Bay Territory Administration to be a lodgement point for sealed complaint documents about the AFP. It should be able to provide information to complainants about the complaints process and how to contact the NIIC. It should have available information leaflets about the complaints system.

140. The AFP should enter into a memorandum of understanding with the Department of the Environment, Sport and Territories in relation to the policing of Jervis Bay.

### **Requirements on non-AFP appointees**

141. Department of the Environment, Sport and Territories personnel handling complaints need to be subject to the same accountability, confidentiality and privacy requirements as apply to AFP appointees.

### **The external territories**

142. The NIIC should arrange with the Department of the Environment, Sport and Territories for the respective administrations of Christmas, Cocos (Keeling) Islands and the Office of the Administrator of Norfolk Island to be lodgement points for sealed complaints documents about the AFP, for transmission to the NIIC. Each should be able to provide information to complainants about the complaints process and how to contact the NIIC. Each should have available information leaflets about the complaints system.

143. The AFP in conjunction with the NIIC should develop a policy for increasing awareness of the complaints systems in the external territories.

### **Training for AFP personnel**

144. The AFP should develop specific training programs and induction packages for officers who are to work in the external territories. In developing these measures it should consider consulting with the Department of Foreign Affairs and Trade and the Department of Environment, Sport and Territories.

### **Translating and interpreting services**

145. The AFP should develop a policy in relation to the external territories for the availability and use of independent and qualified interpreters and translators. This policy should be particularly focussed on Christmas Island and the Cocos (Keeling) Islands.

## **Chapter 17 - Groups who may have special needs**

### **EEO**

146. Education of officers on the productivity benefits of an EEO program is essential to effect desired long term changes in AFP culture and to promote EEO. The AFP should consider consulting with bodies with relevant expertise and experience such as the Office of the Status of Women as it continues to develop its EEO program and grievance procedures.

147. NCA and AFP members who sit on recruitment and promotion panels need to be adequately trained to assess applicants in relation to EEO and also to ensure they correctly apply the principles of EEO to the selection process.

### **Women in policing**

148. The Commission supports the recommendations made at the first Australasian Women Police Conference and encourages the AFP and the NCA to actively participate in implementing the recommendations in their own organisations and throughout the Australasian law enforcement environment.

## **Cross-cultural training**

149. Decision makers in the AFP and NCA complaints and disciplinary systems should have effective cross-cultural communications training. The NIIC as the proposed primary investigatory body should also develop its own programs and strategies particularly for those who deal with complaints.

## **Aboriginal and Torres Strait Islander liaison and support**

150. The NIIC should employ an Aboriginal or Torres Strait Islander liaison and support officer in relation to assisting, where appropriate, Aboriginal or Torres Strait Islander complainants. The officer should also assist in helping to publicise the programs amongst Aboriginal and Torres Strait Islander communities.

151. The NIIC should establish links with relevant bodies concerned with Aboriginal and Torres Strait Islander interests.

## **Interpreters and translators**

152. The AFP and the NCA should ensure that interpreters and translators who satisfy the standards of the National Accreditation Authority for Translators and Interpreters are used wherever there is an issue of proper comprehension because of linguistic reasons. This should be especially the case for formal interviews and statements.

The AFP and NCA should monitor the implementation of this principle and explain failures to meet its requirements.

## **Racially prejudiced behaviour**

153. There should be a misconduct proceeding for the AFP and the NCA available against an officer who abuses his or her authority or acts improperly on the grounds of another person's race, ethnicity, national origins, cultural or religious beliefs.

## **Policing beats**

154. The AFP should develop a formal policy for the policing of beats and should consider the policy developed by the NSW Police Service.

## **Gay and lesbian issues**

155. The AFP should provide training to all members and staff members to encourage attitudes of acceptance of gays and lesbians within the workplace and within the community.

The AFP's policies and performance on these issues should be monitored and examined in consultation with relevant community groups.

## **Domestic violence**

156. The AFP strategy in relation to domestic violence in the ACT should include the following matters.

- Police need to be clear about their law enforcement role and not confuse this with a conciliator role which might minimise the seriousness of the violence and may jeopardise the safety of the victim.
- Training should be given to all new recruits and refresher training to all officers at appropriate intervals. The content of that training should be consistent with the guidelines of the National Committee on Violence Against Women and the National Strategy on Violence Against Women.
- Police should have clear guidelines on charging and on their powers of arrest where a criminal offence has occurred.

- Police regional instructions should direct police to charge where police have reasonable grounds to believe that a criminal offence has occurred in the context of domestic violence.
- The regional instructions should specify that the practice of referring the victim to a service to obtain a domestic violence protection order or a restraining order as a substitute for charging is unsatisfactory and unprofessional.
- The decision about whether to charge should be made by the police and not by the victim. Both victim and offender should be told that the police will decide whether to charge.

There should be a specialist domestic violence unit to

- drive and monitor the implementation by police of the ACT Domestic Violence Strategy
- provide support and advice to other police on domestic violence matters
- monitor the quality of domestic violence response by the police
- liaise with external agencies and victims
- undertake police domestic violence training
- undertake law reform activity
- co-ordinate police-community education initiatives.
- The Unit should also
- have a Domestic Violence Liaison Officer
- recognise the need for new instructions on exercising the power to arrest and to grant bail, and on the timing and content of training for police on domestic violence.

### **Strip searches**

157. The AFP Commissioner should consider the imminent Ombudsman's report on strip searches and determine in conjunction with the Ombudsman any changes to rules, procedures, training and information. The results of the Ombudsman's report should be available to the NIIC and considered by it.

### **Youth**

158. The Commission endorses the recommendations of the first national summit on police and ethnic youth relations and suggests that the AFP and the NCA should consider these initiatives and participate as appropriate.

159. The AFP should consider the Ombudsman's report on youth and determine in conjunction with the Ombudsman any changes to rules, procedures, training and information. The results of the Ombudsman's report should be available to the NIIC and considered by it.

160. The AFP and NIIC should also consult with peak youth organisations on appropriate methods of providing information and education about the complaints procedure to youth.

### **People with a disability**

161. The AFP and NCA should seek advice from peak disability organisations in developing a comprehensive policy to meet their obligations under the Discrimination Disability Act particularly in relation to recruitment, conditions of employment and provision of services.

162. Any policy on the response to people with a disability should consider the definition of disability provided for under the DDA.

163. The AFP, NCA and NIIC should consult with peak disability organisations and the Disability Discrimination Act Legal Advocacy Services on appropriate methods of providing information and education about the complaints procedures to people with a disability.

# 1. Introduction

## The references

1.1 In 1995 the then federal Attorney-General, the Hon Michael Lavarch MP, asked the Commission to review the complaints and disciplinary systems of the Australian Federal Police (AFP) and those of the National Crime Authority (NCA). The Commission received the AFP reference on 29 March 1995 and the NCA reference on 26 July 1995. The terms of the references are reproduced at p 3-6.

## The AFP reference

1.2 The Commission has been asked to report on the *Complaints (Australian Federal Police) Act 1981* (the Complaints Act) and the AFP's complaints and disciplinary systems. The Complaints Act provides for the complaints process while the disciplinary process is provided for under the AFP Act and its regulations and the Complaints Act. The Commission is required to consider whether the legislation meets the expectations of the public in terms of police accountability, effectiveness and efficiency.

### *Background to the AFP reference*

1.3 This is the first extensive review of the legislation. It arises because of a concern to ensure that the systems for complaints and discipline of the AFP are appropriate, fair and effective for the 1990's and the future. The current Act is broadly based upon the Commission's recommendations in its earlier reports published about 20 years ago.<sup>1</sup>

## The NCA reference

1.4 The terms of the NCA reference are similar to those for the AFP. The Commission is required to inquire into and report on procedures for the investigation and resolution of complaints against the NCA and staff members of the NCA or police officers seconded to the NCA. It is asked to consider whether the system meets the expectations of the public in terms of accountability, effectiveness and efficiency. In doing this the Commission is to have regard to its reference on the AFP and to carry out the two references in conjunction.

### *Background*

1.5 There is currently no formal complaints system against the NCA, its staff or those seconded to it. Instead there is an internal administrative arrangement for complaints to be forwarded immediately to the Chairperson of the NCA. The Chairperson then directs officers of the NCA to conduct inquiries and to compile reports. The Chairperson considers these reports and decides upon appropriate action.

1.6 The current lack of any formal, external complaints system is widely regarded as highly undesirable. The major issues have been who should provide the review and to which groups of the NCA's mixed workforce<sup>2</sup> should it apply. There have been two major attempts to legislate to establish a formal complaints system but they have been unsuccessful.<sup>3</sup>

1.7 There is also no formal NCA disciplinary system except for those NCA staff who are employed under the *Public Service Act 1992* (Cth) and who are subject to the Australian Public Service disciplinary procedures. In their case the Chairperson of the NCA has all the powers of a Departmental Secretary.

## Other reports and work

1.8 This inquiry has been conducted against a backdrop of a plethora of Australian and overseas reports and inquiries that have dealt with police complaints systems, corruption and police cultures and have investigated specific allegations of police misconduct and corruption. The following describes the major works relevant to the Commission's references.

## ***Commission reports***

1.9 In addition to the earlier reports on complaints the Commission's current reference on children and the legal process<sup>4</sup> is also relevant to this inquiry. That reference considers children and the criminal law, including police questioning of children and young people. The Commission will be releasing a draft recommendations paper in early 1997. The Commission also has a current reference on adversarial litigation that will be considering federal court and tribunal decision making processes. That reference is relevant to a consideration of the appropriate decision making processes for determining disciplinary matters discussed in chapter 10 in this report.

## ***Reports and inquiries relating to the AFP***

1.10 ***The Niland report on the AFP.*** The AFP commissioned Ms Carmel Niland & Associates to audit the AFP 1992-95 Equal Employment Opportunity (EEO) program. That review included an assessment of the AFP's culture. In February 1995 180 employees of the AFP participated in 20 focus groups Australia-wide. The resulting report was confidential but the AFP has publicly commented on the main findings.<sup>5</sup> It is referred to in chapter 9 of this report.

1.11 ***The Harrison inquiry.*** On 5 August 1996 the Attorney-General, the Hon Daryl Williams AM QC MP announced an inquiry into allegations of corruption within the AFP. The inquiry is being conducted by Mr Ian Harrison SC.

1.12 The inquiry is being conducted pursuant to the AFP Complaints Act s 50. That section provides that the Minister may arrange for an inquiry into any action taken by an AFP appointee or any other matter relating to the AFP and in such manner as the Minister determines. Under a s 50 inquiry the inquirer may enter AFP premises and inspect documents and examine property. The inquirer may also direct AFP appointees to provide information and answer questions. There is no right to fail to produce or answer questions on the ground that it may incriminate the person. A failure to comply with a direction to produce data or answer questions makes the person liable to a penalty of \$1000 or 6 months imprisonment. There is no power under s50 to require persons other than current AFP appointees to provide information or answer questions or to search premises other than AFP premises.

1.13 The inquiry is particularly directed to investigate allegations made by a former AFP officer, Mr Alan Taciak. Mr Harrison is to report on associated practices and procedures used by the AFP which may be deficient and which may have contributed to, or facilitated, corrupt practices. The inquiry is expected to report to the Attorney-General by 18 April 1997.

## **Federal reports and inquiries**

### ***Royal Commission into Aboriginal deaths in custody***

1.14 The Royal Commission was established in October 1987 to investigate concerns about Aboriginal people dying in custody and the apparently inadequate investigations into their deaths. Volume 4 of the Royal Commission's report deals specifically with complaints mechanisms against the police.<sup>6</sup> The Commonwealth Government's responses to the Royal Commission Inquiry are the subject of annual reports by the Commonwealth.<sup>7</sup> The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs has also reported on the implementation of the recommendations of the Royal Commission.<sup>8</sup>

### ***Inquiry into Racist Violence***

1.15 The National Inquiry into Racist Violence was initiated by the Human Rights and Equal Opportunity Commission following representations to it about an apparent increase in the incidence of racially motivated violence in Australia.<sup>9</sup> The report made recommendations about police complaints procedures, particularly in the context of racist violence against Aboriginal people and against people on the basis of their ethnic identity.

## ***PJC report on the NCA***

1.16 The Parliamentary Joint Committee (PJC) on the National Crime Authority has provided an evaluation of the NCA in its report *Who is to Guard the Guards? An Evaluation of the National Crime Authority*.<sup>10</sup> That report considers the accountability of the NCA and makes a recommendation about the handling of complaints made against it. That material is considered in detail in chapter 5.

## ***Access to Justice***

1.17 The Access to Justice Advisory Committee was appointed by the then Attorney-General and the then Minister for Justice to make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and make the system fairer, more efficient and more effective.<sup>11</sup> The report deals with access to justice generally and also deals specifically with complaints against lawyers, standards of service for consumers and the role of the Ombudsman.

## ***Review of the Commonwealth Ombudsman***

1.18 In 1991 the Senate Standing Committee on Finance and Public Administration reported on the scope of the Ombudsman's jurisdiction, the Ombudsman's powers and functions and the adequacy of its resources.<sup>12</sup>

## **Queensland**

### ***The Fitzgerald inquiry***

1.19 In response to a number of media exposes in 1987 of widespread corruption in Queensland, implicating among others, members of the Queensland Police Department, the Queensland Government set up an inquiry led by Mr GE Fitzgerald.<sup>13</sup> That inquiry recommended a wide range of reforms including the establishment of an Electoral and Administrative Review Commission and a Criminal Justice Commission. The latter was to be a permanent body charged with monitoring, reviewing, co-ordinating and initiating reform of criminal justice in Queensland.

### ***Carruthers inquiry***

1.20 On March 1996 an inquiry led by the Hon Kenneth Carruthers QC began into the Memorandum of Understanding purported to be signed by the President of the Police Union of Employees and the then Opposition leader Mr Borbidge (now the Queensland Premier) and the then Coalition Spokesperson for Police, Corrective Services and Racing, Mr Cooper (now the Minister). The inquiry includes an investigation into whether any member of the Queensland Police Service or any other person should be charged with a criminal or disciplinary offence.

1.21 On October 29, 1996 Mr Carruthers resigned from the inquiry stating that his independence had been 'fatally compromised' by a separate inquiry into the CJC established by the Queensland Government and which is headed by Mr Peter Connolly QC. This inquiry is to review the future role, structure, powers and operations of the CJC. It was announced on 7 October 1996.

### ***Bingham inquiry***

1.22 In March 1996 the Minister for Police and Corrective Services and Minister for Racing appointed a committee chaired by Sir Max Bingham QC to review the Queensland Police Service.<sup>14</sup> It presented its report in July 1996. The report dealt with, among other things, the complaints and disciplinary systems and accountability.

## **Western Australia**

### *Argyle Diamond inquiry*

1.23 The WA Police Service engaged officers from the AFP to review two WA police investigations in 1990 and 1992 into the theft of diamonds from the Argyle Diamond Mines Pty Ltd. There were suggestions that the investigations were inefficient and or compromised by police corruption.

### *WA Select Committee report*

1.24 The Select Committee on the Western Australian Police Service released an interim report considering the role of the Internal Affairs Unit of the WA Police Service and other methods of dealing with police corruption.<sup>15</sup> The Select Committee recommended the development of a Police Anti-Corruption Commission.

## **New South Wales**

### *NSWLRC inquiry into people with disabilities and the criminal justice system*

1.25 The NSW Law Reform Commission is currently inquiring into the law and practice of New South Wales relating to the treatment of the intellectually disabled in the criminal justice system. It has released a discussion paper that includes comment on the adequacy of police complaint mechanisms for the intellectually disabled.

### *NSW Parliamentary report on Ombudsman*

1.26 In April 1992 the Joint Committee on the Office of the Ombudsman reported on the role of the Ombudsman in investigating complaints against the police.<sup>16</sup> Its main focus was on improving the capacity and efficiency of the conciliation process. The Joint Committee resolved in September 1995 to conduct a further review of the Ombudsman's role in complaints against the police, including the relationship of the Office of the Ombudsman with other bodies which have a role in the investigation of complaints against the police, for example, the NSW Independent Commission Against Corruption (ICAC).

### *NSW Ombudsman's report*

1.27 In December 1995 the NSW Ombudsman made a special report to the NSW Parliament on the NSW Police Complaints System. This report described the workings of that system.<sup>17</sup>

### *The NSW Royal Commission into the Police*

1.28 On 13 May 1994 The Hon Justice James Wood was appointed sole Commissioner to inquire into the operations of the NSW Police Service. The Royal Commission published interim reports in February 1996<sup>18</sup> and November 1996<sup>19</sup>. Its final reporting date is on or before 31 March 1997.

## **Victoria**

### *Project Guardian*

1.29 In response to issues arising from commissions of inquiry into police corruption in other jurisdictions, both local and overseas, the Victorian Chief Commissioner of Police established Project Guardian in February 1996 and directed that an Ethical Standards Department be established to replace the existing Internal Investigations Department.<sup>20</sup> Project Guardian is also considering responses to the negative aspects of police culture, police corruption and the disciplinary system. The Project submitted its recommendations to the Chief Commissioner in July 1996. Those recommendations are currently being considered.

## Overseas

### *Mollen Commission report*

1.30 The Mollen Commission inquired into allegations of corruption and anti-corruption procedures in the New York Police Department.<sup>21</sup> It provides a case study on the resilience and adaptability of police corruption and is referred to in chapter 9.

## Other Australian complaints systems

1.31 The Commission conducted research into State and Territory police complaints systems and sought comment and information from the agencies involved in those systems. A summary of those systems, including major similarities and differences, is contained in the Commission's issues paper, *Under the spotlight. Complaints against the AFP and the NCA* (IP 16).<sup>22</sup> The institutions that review police complaints take various forms. South Australia has a specialist Police Complaints Authority, Queensland has an omnibus approach provided by the Criminal Justice Commission, while the other jurisdictions have a generalist Ombudsman providing review. In Victoria there is a Police Complaints Ombudsman within the Victorian Ombudsman's office.

## International approaches

### *International consultations and submissions*

1.32 The Commission investigated the complaints systems of a number of overseas countries including England, the United States of America, New Zealand, Canada and the Scandinavian countries.<sup>23</sup>

1.33 The Commission requested information on complaints against law enforcement agencies from two peak international bodies, namely, the International Association for Civilian Oversight of Law Enforcement Agencies (IACOLE) and the International Ombudsman Institute. The President of IACOLE provided information and views to the Commission as did the Royal Canadian Mounted Police Public Complaints Commissioner, and the Hong Kong ICAC. The Commission also held discussions with Dr Maurice Hayes who is reviewing the Northern Ireland police complaints procedures. Dr Hayes visited Australia.

## The Commission's work

### *Publications*

1.34 In mid 1995 the Commission sent a short summary of its preliminary views on the major issues in these inquiries to organisations and individuals with a special interest or expertise in this area. The Commission received 29 submissions in response. The Commission then released an issues paper *Under the spotlight. Complaints against the AFP and the NCA* (IP 16) in November 1995. IP 16 identified what the Commission considered to be the relevant issues and sought comment. In July 1996 a draft recommendations paper (DRP 2) was published and circulated. It indicated the preliminary views of the Commission and formed the basis for further consultation. The Commission received over 60 submissions in response to IP 16 and over 40 in response to DRP 2. In all the Commission has received about 140 submissions in the course of this inquiry.

### *Consultations*

1.35 *Honorary consultants.* The Commission appointed honorary consultants with a wide range of experience and expertise who have met with the Commission to discuss major issues. The Commission thanks them for their contributions. They are listed in Appendix A.

1.36 *Consultations.* Throughout this inquiry, but particularly in February, March and April 1996 the Commission consulted with a number of organisations with a special interest in these references including the AFP, the NCA, State and Territory police services and Ombudsmen, the Queensland Criminal Justice Commission (CJC), the South Australian Police Complaints Authority and the NSW Royal Commission into the Police. The Commission conducted consultations with AFP and NCA personnel at each of the AFP and

NCA's major offices. The Commission also met with representatives of professional associations representing AFP and NCA personnel.

1.37 The Commission had a number of meetings with the AFP Commissioner and the NCA Chairperson including the current NCA Chairperson Mr John Broome and his predecessor, Mr Tom Sherman. On 16 September 1996 members of the Commission appeared before the Parliamentary Joint Committee on the NCA to discuss the Commission's draft recommendations paper, particularly in relation to the NCA.

1.38 The Commission also contacted academics, legal practitioners, community legal centres, and a wide range of organisations representing different groups in the community such as Aboriginal people and Torres Strait Islanders, people from non-English speaking backgrounds, gays and lesbians, women and youth.

1.39 During February and March 1996 the Commission also held public meetings in the Australian capital cities, Norfolk Island and Jervis Bay.

## **Structure of this report**

- Chapter 2 discusses the Commission's approach to this inquiry and identifies major themes and issues.
- Chapter 3 assesses the current AFP complaints system.
- Chapter 4 discusses investigation models for the AFP and describes the Commission's preferred model, the establishment of a National Integrity and Investigations Commission (NIIC).
- Chapter 5 discusses a complaints system for the NCA and recommends the NIIC.
- Chapter 6 explains the suggested role and structure of the NIIC.
- Chapter 7 discusses the investigative procedures of the NIIC including categories of complaints and time limits.
- Chapter 8 examines responses to the Commission's proposed NIIC.
- Chapter 9 expands on the reasons for establishing the NIIC.
- Chapter 10 discusses the current AFP and NCA disciplinary processes and suggests an alternative approach based on increased managerial responsibility and then the avenue of administrative review by the Administrative Appeals Tribunal (AAT).
- Chapter 11 considers the consequences of having AAT review for matters such as the standard of proof and orders for costs.
- Chapter 12 discusses Alternative Dispute Resolution (ADR), sanctions and the provision of information to complainants and officers.
- Chapter 13 concerns the role of the AFP and the NCA and the NIIC in strategies and measures to prevent complaints and corruption.
- Chapter 14 considers the scope of the complaints systems for the AFP and the NCA including the definition of complaint, discretions not to investigate and classification of outcomes of complaint investigations.
- Chapter 15 examines the processing of complaints including their receipt and recording.
- Chapter 16 discusses some special issues for the AFP in its community policing role in the Australian Capital Territory (ACT), Jervis Bay and the external territories.

- Chapter 17 examines some personnel in the AFP and the NCA who may have special needs in relation to complaints systems and groups external to these agencies who also may have special needs.

## **2. Commission's approach**

### **Introduction**

2.1 The Commission is required to look at the complaints and disciplinary systems of the AFP and the NCA. This chapter discusses the Commission's general approach to the major issues raised in this inquiry. It identifies the main themes of the report and the major arguments that have emerged. It also identifies and summarises the key recommendations of the report.

### **Complaints and disciplinary systems in context**

2.2 Complaints and disciplinary systems are to 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. Law enforcement agencies should be professional, effectively managed, vigilant against corruption and misconduct and publicly accountable. Powers should be exercised with respect for human rights and with regard to the appropriate balance between civil liberties and effective law enforcement. Complaints and discipline are integral parts of law enforcement accountability. They are as essential to the notion of 'good' policing as they are to preventing police malpractice and abuse of authority.<sup>24</sup>

2.3 Some law enforcement officers will be corrupt and others will engage in other forms of serious misconduct. No system or package of reforms will totally eradicate these problems. However, the Commission sees as its major objective in this inquiry to recommend a coherent raft of reforms that will act to reduce the incidence of misconduct and corruption and to achieve and maintain high levels of integrity and accountability within the AFP and the NCA. In trying to achieve that objective the Commission has faced a major task of balancing competing interests.

### **Major task - achieving an appropriate balance between internal and external responsibilities**

2.4 The major task in this inquiry is to recommend an appropriate mix between internal and external responsibilities in both the AFP and NCA complaints and disciplinary systems. Internal responsibility refers to the extent to which and the manner in which the AFP and the NCA should investigate complaints and corruption and make disciplinary decisions. It is concerned with the appropriate level of the AFP and the NCA's managerial responsibility and how that can be best achieved. External responsibility refers to the role of bodies independent of the AFP and the NCA in their complaints and disciplinary systems.

2.5 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 to the Government, the Parliament and the Australian community. 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.

2.6 The main aim of managerial responsibility is to allow the agency itself to have a significant role in putting its 'own house in order'. The agency must take a meaningful level of responsibility and accountability for ensuring that complaints are effectively dealt with and that appropriate responses are made to prevent or deter the re-occurrence of the cause of a complaint or corruption. Special responsibilities in this regard must rest with the Commissioner of the AFP and the Chairperson of the NCA.

### **Balancing different demands**

2.7 The Commission's current terms of reference refer to the need to achieve a proper balance between the protection of human rights and civil liberties and the need to protect the community by practical and effective law enforcement.

### ***Practical law enforcement and civil liberties***

2.8 The actions of law enforcement agencies have great potential to affect the rights and liberties of citizens. In maintaining social order these agencies are constantly faced with complex and sometimes competing demands to protect and promote particular rights. Depending on their actions, rights and liberties may be violated as well as protected and enforced.<sup>25</sup> The United Nations *Code of Conduct for Law Enforcement Officials*<sup>26</sup> recognises this:

*Article 1.* Law Enforcement officials shall at all times fulfil the duty imposed upon them by law, serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

*Article 2.* In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

2.9 It is within the context of this need to strike an appropriate balance between these imperatives that any discussion as to the form and content of complaints and disciplinary systems must take place.

### ***International obligations***

2.10 A further demand is that the complaints and disciplinary systems should comply with Australia's international obligations. The terms of reference require the Commission to have regard to its obligations under international law including under

- the International Covenant on Civil and Political Rights
- the Convention on the Elimination of All Forms of Discrimination Against Women
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of the Child.

The relevant provisions of those Conventions for the purpose of this inquiry are contained in Appendix D. The following summarises the thrust of the Conventions for this inquiry:

- there should be equality before the law for all, with effective remedies for violations
- the legal process is to be fair and impartial
- detention and any punishment should not be cruel or inhumane
- public bodies should eliminate discrimination on the basis of sex or race
- in all actions concerning children, the best interests of the child shall be a paramount consideration
- children's rights, for example the rights to liberty and privacy, shall be respected and protected.

### ***Balancing integrity and accountability with operational demands***

2.11 The AFP and the NCA have in their consultations with the Commission mentioned the challenges they face in meeting their objectives of law enforcement in the context of limited budgets and contracting staff levels. The AFP and the NCA are key national law enforcement agencies with high priority objectives in preventing and investigating serious crime including illegal drug importations and fraud. These objectives are further discussed in chapter 10. The challenges they face are likely to become greater given the increasing globalisation of organised crime, its use of sophisticated technology and its capacity to operate within apparently legitimate activities.

2.12 The Commission recognises that the combination of those competing demands and new challenges mean that any time or resources that the AFP and NCA spend on complaints and discipline must be well spent. The Commission considers that the recommendations in this report present a comprehensive and effective program for helping them to achieve and maintain high levels of integrity and accountability which should be regarded as core goals. They are not collateral or supplementary to the AFP and NCA operational side. They should not be considered only when something major goes wrong with a particular operation. The AFP and the NCA should be continually considering integrity and accountability issues and their ramifications in every facet of their work.

2.13 The Commission also recognises that the AFP and the NCA have genuine and understandable concerns about complaints or corruption investigations interfering with their operations and the extent to which their own managerial responsibility is affected by the Commission's recommendations. This report deals with those concerns.<sup>27</sup>

## **Law enforcement misconduct**

2.14 Law enforcement misconduct covers a broad spectrum of activity from minor transgressions of rules and procedures to significant misconduct. While there is some argument about exact demarcations, broadly speaking there are three main types of significant law enforcement misconduct. They are the excessive use of force, corruption and 'process corruption'.

2.15 Many complaints will concern the excessive use of force. Excessive force can involve death, the infliction of grievous bodily harm or serious assault.

2.16 Corruption can broadly be defined as law enforcement behaviour that results in private gains at public expense.<sup>28</sup> It can involve the misuse of authority by law enforcement officers so as to produce personal gain for themselves or others. There can also be 'process corruption' where law enforcement officers fabricate evidence, act illegally in the course of investigations or in other ways subvert or obstruct the administration of justice.

### ***Why the Commission is considering corruption***

2.17 In this report the Commission deals with responses to corruption and anti-corruption measures. The NCA questioned the Commission's decision to consider responses to issues about AFP and NCA corruption, preferring that the Commission examine, for the purposes of this inquiry, only complaints.<sup>29</sup> Certainly the Commission's terms of reference do not refer explicitly to corruption. However, the Commission has concluded that to ignore corruption would be to provide only a partial analysis and a package of incomplete reforms. First, to put corruption to one side would be to ignore one of the most significant complaints system options. The CJC single agency model deals with complaints and corruption and is the subject of national and international scrutiny and interest. The second and fundamental reason is that complaints and corruption cannot and should not be rigidly separated.

2.18 Some complaints will be directly about corruption. For example, the Ombudsman in her 1995-96 Annual Report suggests that were 14 such complaints to her in that year.<sup>30</sup> This would not include internal allegations, where it is more likely that complaints concerning corruption will be made. The Commission expects that an improved complaints system, improved law enforcement cultures and greater protection and encouragement of whistleblowers may lead to more complaints directly concerning corruption. However, the reason to avoid rigid distinctions between complaints and corruption goes beyond the number of complaints that directly raise corruption.

2.19 One of the major limitations of the current AFP complaints system is that it has drawn artificial distinctions between complaints and allegations. This has meant that internal complaints, including those made by whistleblowers and matters that may directly or indirectly concern corruption, have not as a matter of course received external scrutiny or sufficient external scrutiny. Yet these are the matters that need considerable and direct external involvement because they may be complex and contentious and, more importantly, they squarely raise the issue of whether the law enforcement agency should be relied upon to

investigate their own. Any external agency providing external input must have the mandate, powers and capacity to investigate those matters that raise serious misconduct.

2.20 If a rigid distinction is maintained between complaints and corruption it would mean that the external agency could never build up a full picture of the level and nature of misconduct in the agency and identify trends and problem areas. It is necessary to recognise that misconduct and deviance are part of a continuum and not to draw artificial distinctions in that continuum.

2.21 Many complaints, even minor ones, may provide indirect but highly relevant information about corruption. This view has been confirmed by the CJC which advises that it is undesirable to draw rigid distinctions between complaints and corruption. What is necessary is to use information from complaints and from other intelligence to build profiles of personnel and units and to test hypotheses. That is a core task of any effective anti-corruption unit.

2.22 One of the great failings of police management has been the tendency to 'segmentalise' issues and areas and to take narrow, compartmentalised perspectives on corporate problems.<sup>31</sup> In the Commission's view drawing too rigid a distinction between complaints and corruption would be an example of that tendency. Complaints and corruption should not be shunted off to discrete areas as they have often been in police complaints systems.

2.23 From the public viewpoint, complaints and corruption are about law enforcement agencies and officers doing the wrong thing. They are both about misconduct. The major policy objectives are the same - that is, protecting and improving law enforcement integrity and accountability. There is a clear public concern with corruption in Australian law enforcement agencies that affects each jurisdiction. Corruption can be a significant drain on the resources of public and private organisations and on the public revenue. It can diminish the effectiveness and efficiency of law enforcement agencies. It can require a huge expenditure of resources to detect and punish. It can cause very heavy damage to public confidence in the police and the administration of justice. Inquiries into police corruption receive extensive media coverage as evidenced by the current NSW Royal Commission into Police and the Fitzgerald Inquiry in Queensland in the 1980's. The Commission's consultations and submissions received have confirmed this as have other inquiries and research. From that public interest perspective it would be remiss of the Commission to try to avoid dealing with corruption issues in the AFP and the NCA.

2.24 Finally, the Commission would add that only the NCA took the view that it was inappropriate or undesirable for the Commission to consider corruption in the way that it has. Many others consulted or who made submissions accepted that complaints and corruption should be examined. The AFP, for example, clearly saw the need to give full consideration to how best to ensure its integrity and accountability. It recognised that the lack of direct and active involvement of an external agency for matters involving serious misconduct and corruption was a weakness of the current AFP complaints system. The Inspector-General of Intelligence and Security commented that complaints handling goes hand-in-hand with efforts to encourage and promote high ethical standards and the fight against corruption.<sup>32</sup>

## **The Commission's key recommendations**

2.25 The Commission believes that the recommendations in this report get the balance right between these different demands. There are two major reforms that represent paradigm shifts from the current law and processes.

### ***The NIIC***

2.26 The Commission recommends a new body to be the external complaints and anti-corruption authority for the AFP and the NCA. The National Integrity and Investigations Commission (NIIC) would replace the Commonwealth Ombudsman in relation to AFP complaints and would be the first external agency introduced to handle NCA complaints.

2.27 The NIIC is a hybrid investigative body that draws upon some of the features of other existing agencies but is not exactly the same as any other. It is specially designed to meet the particular integrity and accountability demands of the AFP and the NCA.

2.28 The NIIC is a very different body with very different capacities to the Commonwealth Ombudsman. It has a specific focus on the AFP and NCA. It would be an active investigator of complaints and corruption and an auditor, with full access to all relevant information, of the AFP and NCA's performance in relation to integrity and accountability. Unlike the Commonwealth Ombudsman it would not be an external agency that predominantly reacts to complaints and reviews internal investigations into them. This is inadequate in today's criminal justice environment. Modern strategies in law enforcement are beginning to rely more and more on proactive investigations and strategic intelligence.<sup>33</sup> The traditional reactive approach to incidents is no longer adequate.<sup>34</sup>

2.29 The NIIC would also be involved in approving anti-corruption and anti-fraud strategies and endorsing investigation procedures to be followed by the AFP and NCA. Together these changes would constitute a significant re-arrangement and restructuring of the balance between internal and external input.

2.30 The AFP and the NCA would continue to have a significant role in handling and investigating complaints. However, their work in doing so would be managed, supervised or audited by the NIIC which would have a wide range of powers and ultimate responsibility to the Executive and to Parliament for its role in the working of the whole system. This would achieve the objectives of credibility and effectiveness including clear accountability. It also establishes a system whereby each complaint receives the appropriate response to its particular circumstances. But more importantly it reflects the Commission's conviction that properly attending to complaints and allegations of misconduct should be given equal priority to the discharge of operational responsibilities. The Australian experience is that to do otherwise will in the medium to longer term inevitably lead to the loss of professionalism of the AFP and the NCA and to a sapping of public confidence.

2.31 It is important to stress that the Commission is not recommending a federal ICAC or CJC. Such bodies would have much broader ambit than the NIIC. The NSW ICAC model looks at corruption across the whole range of the NSW public sector (now excluding the NSW Police Service). If there was a federal ICAC it would have jurisdiction in relation to all federal departments and agencies. The CJC has a very broad role in the functioning and administration of the Queensland criminal justice system. Its functions are

- investigating alleged or suspected misconduct by members of the Queensland Police Service (QPS)
- monitoring and reviewing the administration of criminal justice
- providing witness protection
- in some circumstances to mount major operations to investigate organised crime or major crime
- overseeing and managing criminal intelligence and
- providing policy and research on the QPS and law enforcement generally.

#### ***Managerial responsibility for misconduct and AAT review***

2.32 Disciplinary systems are intended to ensure that personnel comply with appropriate standards of conduct. The Commission recommends a significant change in the approach to discipline. In the Commission's view the traditional para-military, disciplinary model with its quasi-criminal approach is outdated and unsatisfactory. This is borne out by the Commission's consultations and submissions received and also by disciplinary developments in other jurisdictions in Australia and overseas. In its place the Commission recommends a new managerial model that gives the AFP and NCA primary responsibility and decision making for imposing discipline on their personnel. This is in accord with modern managerial theory, and increasingly, managerial practice. However, there must be appropriate independent and external scrutiny of that decision making process.

2.33 Disciplinary decisions by the management of the AFP and the NCA would be subject to review on their merits by the Administrative Appeals Tribunal (AAT) an external agency with expertise in this role and with an appropriate case management process.

2.34 The one exception to the process of full merits review would be that the AAT would not be able to review decisions by the AFP Commissioner or NCA Chairperson to terminate an officer's appointment for 'loss of confidence'.<sup>35</sup> In those cases the AAT would be limited to reviewing whether compensation should be made to such an officer for this termination and the level and nature of that compensation. The AAT would not be able to order the reinstatement of an officer where the AFP Commissioner or the NCA Chairperson in effect no longer had confidence in that officer.

2.35 This recognises the policy imperative that law enforcement agencies must only have officers who meet the standards expected and demanded of those agencies. The need for integrity and accountability and the capacity to perform the tasks is such that it must override any individual's expectation of uninterrupted continuity of employment. These decisions to terminate for 'loss of confidence' would be subject to judicial review as to their lawfulness under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

2.36 As a consequence of these recommendations the Federal Police Disciplinary Tribunal (FPDT) which currently has jurisdiction in relation to AFP disciplinary matters would no longer be necessary and would be abolished. The Commission has come to this conclusion not on the basis of any suggested criticism of the performance or standards of the FPDT or of any of its members, but because merits review of managerial decision making would be more readily and effectively carried out by the AAT. The Commission gave serious consideration to the option of having a re-shaped FPDT review disciplinary decisions of the AFP and the NCA according to the principles of administrative review but finally determined that the AAT was better placed to provide that type of review. In coming to that decision the Commission took account of the view of the AAT itself which was that it was an appropriate body to provide this review.

## **Objectives of a complaints system**

2.37 A fundamental task is to establish what should be the main objectives of the AFP and the NCA complaints and disciplinary systems. The Commission canvassed this issue thoroughly in the issues paper. It also proposed a list of objectives for complaints systems in the DRP.

2.38 The Access to Justice Report argued that there were Commonwealth standards that should apply to complaints systems. They listed

- independence and impartiality
- accessibility
- efficiency and effectiveness
- openness and accountability.<sup>36</sup>

2.39 These standards should apply to the AFP and NCA just as much as they should apply to other federal agencies. In particular, openness should be a guiding principle and should only be curtailed where there is an overriding privacy consideration or the disclosure of information that would prejudice the security of an operation.

## **Major objectives**

2.40 The Commission has identified the main objectives for the AFP and NCA complaints systems as being to

- ensure public confidence in these agencies and their complaints systems
- achieve proper accountability of the agencies and their officers

- be fair to complainants and to AFP and NCA officers and staff including taking into account the requirements of natural justice and privacy considerations
- be credible to the agencies and their officers and staff
- be accessible to the community
- promote appropriate standards of conduct, ethics and integrity from officers and staff and their agencies
- provide the appropriate response, particularly the appropriate level of investigation, to the full range of complaints, from minor to serious, including those involving corruption
- provide feedback to the agency about individual officers and staff, agency practices, procedures and operations
- take into account appropriately other agency priorities such as law enforcement operations
- be timely in process and outcome
- use resources efficiently.

2.41 The Commission does not propose to try to rate these objectives in importance as a fully effective and integrated system should endeavour to meet each of them. However, it is clear that ensuring credibility with the public and the agencies themselves are very significant objectives.

2.42 Ensuring public confidence in the AFP and NCA is a key objective. A paramount principle of Australian law is that justice must not only be done but be seen to be done. The system must be transparent. Decision-making must be open and discernible including the reasons for a particular finding. This means that the general public should be able to see how complaints are dealt with and whether the outcomes satisfy general community standards and expectations. A failure to ensure public confidence may lead to public mistrust of the AFP and the NCA. This mistrust can taint the whole administration of justice. It 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 affect public perceptions of other aspects of administration and government, sometimes leading to widespread rumour and distortion and providing sustenance to all enveloping conspiracy theories.

### ***Articulating these objectives***

2.43 The DRP proposed that the major objectives of the complaints systems should be included in the new legislation. The objectives are likely to remain the same for the foreseeable future and should therefore be enshrined in legislation. This will assist in the understanding of the fundamental objectives of the legislation and will be useful to those who use it. It will also serve an educative function. The objectives should also be incorporated in AFP and NCA codes of conduct, management goals and practices.

### ***Submissions***

2.44 The AFP submitted that complaints systems must be rigorous, transparent, effective, accountable and structured to ensure public confidence in both the process and the outcomes.<sup>37</sup> The Victoria Police supported the objectives identified by the Commission.<sup>38</sup> It agreed with the Commission's rationale for including the objectives in legislation, police codes and corporate goals and objectives. The NCA agreed with the objectives as outlined by the Commission.<sup>39</sup> It argued, however, that including the objectives in the organisational code of conduct may be inappropriate because it could blur the distinction between the goals of the organisation and the goals of the complaints system. The NCA emphasised the development of a complaints process which was flexible and comprehensive.

### *Commission's views*

2.45 There was wide support for the objectives identified by the Commission. The inclusion of these objectives in general codes of conduct and corporate goals would highlight the importance of an effective complaints system to all officers.

#### **Recommendation 1 - Objectives of AFP and NCA complaints systems**

The main objectives for the AFP and NCA complaints systems are to

- ensure public confidence in these agencies and their complaints systems
- achieve proper accountability of the agencies and their officers
- be fair to complainants and to AFP and NCA officers and staff including taking into account the requirements of natural justice and privacy considerations
- be credible to the agencies and their officers and staff
- be accessible to the community
- promote appropriate standards of conduct, ethics and integrity from officers and staff and their agencies
- provide the appropriate response, particularly the appropriate level of investigation, to the full range of complaints, from minor to serious, including those involving corruption
- provide feedback to the agency about individual officers and staff, agency practices, procedures and operations
- take into account appropriately other agency priorities such as law enforcement operations
- be timely in process and outcome
- use resources efficiently.

These objectives should be included in an objects clause in the new legislation. They should also be incorporated in AFP and NCA codes of conduct and corporate goals and practice where appropriate.

### *Ensuring effective management responses*

2.46 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. This approach is supported by the proposition that the causes of misconduct are often to be found in problems with the organisation and culture of law enforcement agencies.<sup>40</sup> Complaints rather than viewed entirely in a negative or defensive fashion as they tend to be by many organisations, and in particular by law enforcement agencies, can then be seen as indicators of systemic difficulties. Complaints from that perspective provide essential information about the health of the organisation and its problem areas. For example, complaints can identify shortfalls in the lines of supervisory responsibility for street level policing.<sup>41</sup> Instead of a focus on punishment or deterrence of the individual law enforcement officer after the event, the primary objective is systemic *ex ante* review to improve practice and procedures before systematic problems emerge.

### *Commission's views*

2.47 The Commission considers that this new focus on management responsibility should be specifically encouraged, given the difficulties that law enforcement agencies may have in changing their approaches to the role and uses of complaints. The following measures should assist in this process.

2.48 Complaint forms should contain a section on suggested remedial action and consequences for management in relation to the particular complaint including implications for policies, practices and procedures. There should also be a record of follow-up and implementation.

2.49 AFP and NCA managements in consultation with the NIIC should consider how best to incorporate into their management processes proper consideration of complaints and misconduct including

- action in relation to specific officers and staff members
- management issues arising from complaints and misconduct
- implications for policies and practices (eg personnel selection, training, supervision, rules and procedures)
- regular reviews of the complaints and corruption systems and the disciplinary process.

2.50 The NIIC in consultation with the AFP and NCA should consider what information about complaints, corruption and discipline should be contained in their Annual Reports. The NIIC may consider establishing guidelines and standards. The Commission would expect that Annual Reports would include useful information on the incidence and nature of complaints and any action taken including an analysis of trends and managerial responses.

2.51 The NIIC should develop as part of its protocols with the AFP and the NCA a process for monitoring the implementation of its recommendations by the agencies.

### **Recommendation 2 - Ensuring effective management responses**

Complaint forms should contain a section on suggested remedial action and the consequences for management in relation to the particular complaint including implications for policies, practices and procedures. There should also be a record of follow-up and implementation.

### **Recommendation 3**

AFP and NCA managements in consultation with the NIIC should consider how best to incorporate into their management processes proper consideration of complaints and misconduct including

- action in relation to specific officers and staff members
- management issues arising from complaints and misconduct
- implications for policies and practices (eg personnel selection, training, supervision, rules and procedures)
- regular reviews of the complaints and corruption systems and the disciplinary process.

### **Recommendation 4**

The NIIC in consultation with the AFP and NCA should consider what information about complaints, corruption and discipline should be contained in their respective Annual Reports. The NIIC may consider establishing guidelines and standards. The Commission would expect that Annual Reports would include useful information on the incidence and nature of complaints and any action taken including an analysis of trends and managerial responses.

### **Recommendation 5**

The NIIC should develop as part of its protocols with the AFP and the NCA a process for monitoring the implementation of its recommendations by the agencies.

## **Prevention of the causes of complaints and corruption**

2.52 The prevention of behaviour or conduct that is likely to lead to complaints or corruption saves resources which are otherwise spent on acting after complaints have been made or corruption has occurred. Moreover, any reduction in complaints or corruption is likely to increase public confidence in the AFP and the NCA. Individual complaints can be used to identify underlying procedural or chronic problems. These can then be

addressed by implementing improved procedures, training, education, and supervision so that further complaints in those areas are reduced.

### ***Preventing corruption and other serious offences***

2.53 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, the 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 a police culture which frowns upon 'dobbing in mates' or 'rolling over' and giving evidence about corruption and misconduct. Civilians may fail to lodge or pursue complaints because of fears of retaliation whether by use of force or the improper use of the legal process by law enforcement officers. Factors to take into account to help achieve this objective in the context of complaints systems include the protection of whistleblowers and complainants. These factors are discussed in chapter 14.

2.54 Less serious complaints may require a very different approach. For minor complaints involving incivility or misunderstandings, it may be preferable to regard the general public as consumers and the law enforcement agencies as providers of a service. Implicit in this is that the service must be of high quality, that there must be trust between consumers and service providers and that legitimate complaints will be dealt with quickly and fairly. Such a view accords with modern management theory about consumer complaints in respect of other public and private organisations. A possible consequence of this 'consumer' perspective is that there could be a charter of rights for consumers including the making of complaints.<sup>42</sup>

### ***Other strategies and measures***

2.55 A number of preventive measures have been suggested to reduce the number and the severity of complaints and corruption. They include

- organisational change to the law enforcement agencies
- recruitment and promotion including greater 'civilianisation' of staff (that is, staff who have broader backgrounds and experience and who have not only been law enforcement officers)
- education and training
- promotion and lateral entry<sup>43</sup>
- pay and conditions
- ethics training and practice.

2.56 The Commission would expect that the NIIC would consult with the AFP and the NCA on the measures and strategies to be used to reduce misconduct and potential misconduct and to improve integrity and accountability. This is dealt with further in chapter 6. However, there is one major option discussed immediately below that would involve considerable change to the substantive criminal law and to the role of law enforcement agencies.

### ***Re-examining the role and nature of law enforcement***

2.57 There have been increasing calls for redefining the goals and capacity of policing. It is suggested by some commentators that laws which are concerned more with moral repugnance or which prohibit conduct on which the community is divided, need re-examination. Some examples are prostitution, other voluntary sexual behaviour, SP bookmaking, illegal gambling and the illicit sale of alcohol and some drugs. For some minor offences alternatives to criminal sanctions may be preferable. Major issues are the extent to which law enforcement agencies should be involved in the enforcement of morality and the collection of public

revenue. Of particular interest is the relationship between the current drug laws and the incidence of law enforcement corruption.

### *The role of current drug laws*

2.58 There appears to be a causal link between the current drug laws that are based on a policy of prohibition and significant police misconduct and corruption. A number of royal commissions, inquiries and reports have commented on this link.<sup>44</sup> Current drug laws may contribute to law enforcement misconduct including corruption in the following ways.

- 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.<sup>45</sup>

2.59 The Fitzgerald report made the following observation.

Laws which are not or cannot be enforced, or which seek to establish disputed moral standards, generate disrespect for the law and authority. This disrespect is particularly pronounced amongst those who support and patronise illegal activities and those, especially young people, who reject what they consider to be hypocrisy.<sup>46</sup>

2.60 The Fitzgerald report recommended an inquiry into the use of dangerous drugs and policies in response including the question of whether present criminal activities should be legalised or decriminalised. In doing so, the report commented

[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.

There is no benefit in blinkered thinking. The starting point must be an acceptance that illegal drugs are established in the community and that prohibition has not worked. Orthodox policing is quite unable to enforce the law. The limited budget available for criminal law enforcement falls far short of the minimum needed if the present anti-drug laws are seriously to be enforced.

Priorities must be established for the use of the available resources. The need for and social will to provide more resources must be identified. When available, the resources must be allocated so as to give effect to the priorities. One thing is certain: the conventional method of giving the job to the police, on top of all their other responsibilities, has failed all over the world, and a new approach is needed.<sup>47</sup>

2.61 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.<sup>48</sup> 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 ... we are going to have to look

in an organised, cooperative and national way to some innovative and far-reaching methods of dealing with the problem, including education, rehabilitation and other facets of the equation in order to combat it.

... It is destroying the police on a State and Federal level, and there is absolutely no reason to think that it stops at New South Wales boundaries.<sup>49</sup>

2.62 The NSW Police Service supported the comments made by Justice Wood and the need for reform in this area.<sup>50</sup> The New South Wales Police Board has argued that the real challenge is to promote an environment which not only discourages misconduct and corruption but is 'corruption resistant'. For this reason, the Board asserted that corruption cannot be addressed without reference to the drug trade and drug laws.<sup>51</sup>

### ***Submissions and consultations***

2.63 A submission from the University of Technology, Sydney (UTS) Community Law Centre argued that drug laws based on prohibition tend to corrupt law enforcement officers who have the duty to enforce them.<sup>52</sup> It suggested that any attempt to eradicate or minimise police corruption will have little success unless current drug laws are re-examined.<sup>53</sup>

### ***Commission's view***

2.64 Any major change to current drug control laws and policies would require an examination of the substantive laws and policies of the Commonwealth and the States and Territories. It would also raise significant health and criminal justice issues. The Commission is unable to deal with these major issues under its current terms of reference. However, the Commission notes the growing trend to reconsider the effectiveness of drug regulation strategies that place very heavy reliance on prohibition. The call by Justice Wood and the proposals of the Pennington Committee in Victoria<sup>54</sup> for a national effort to consider innovative options to relieve much of the strain being placed on law enforcement agencies should be further considered.

# 3. Assessing the AFP complaints system

## Introduction

3.1 This chapter has three parts

- describing the role of the AFP
- outlining the current AFP complaints system
- assessing the record of that system in the light of the objectives identified in chapter 2.

3.2 The conclusion is that the record of the AFP complaints systems since its inception reveals significant inadequacies. The Commission's consultations and the submissions it received support this conclusion. A consistent theme in many of the responses to this inquiry is that the police, particularly in respect to serious complaints, should not be conducting these investigations. This theme is echoed in the interim report of the NSW Royal Commission into Police and the submissions made to it. It is a concern heightened by the focus on police corruption and misconduct not only in NSW but also in other Australian jurisdictions.

3.3 Chapter 5 assesses the current NCA approach to complaints. Chapter 10 assesses the current AFP and NCA disciplinary systems.

## Background

3.4 The AFP is a federal law enforcement agency which

- investigates breaches or potential breaches of Commonwealth laws on a national basis
- liaises and co-operates with international and overseas law enforcement agencies
- provides community policing in the ACT and Jervis Bay Territory and the following external territories - Norfolk Island,<sup>55</sup> Cocos (Keeling) Island and Christmas Island.

3.5 The AFP's primary national role is the conduct of investigations. In that context it is similar to the United States Federal Bureau of Investigations (FBI). The AFP does not have general jurisdiction in relation to State and Northern Territory laws. Generally it does not have daily contact and interaction with the broad Australian community in a community policing role. The only places where it performs that role are in those territories mentioned above.

## The current AFP complaints process

### *What is a complaint?*

3.6 There is no definition of complaint in the Complaints Act but a complaint must relate to 'action taken by an AFP appointee'.<sup>56</sup> That expression is defined as:

action that the appointee takes or purports to take:

(a) because of his or her being an AFP appointee; or

(b) in the exercise of powers, or the performance of functions, given to him or her as an AFP appointee by this Act or by another law.<sup>57</sup>

3.7 The term 'AFP appointee' includes members of the AFP (that is, the Commissioner, Deputy Commissioners, senior executive commissioned police Officers and commissioned and non-commissioned police Officers), staff members and special members appointed by the Commissioner.<sup>58</sup> Each of these is subject to the Complaints Act.

### ***Complaints and allegations***

3.8 Complaints about AFP Officers are currently divided into two types - 'complaints' and 'allegations'. Complaints by members of the public against the AFP or its personnel are made under the Complaints Act. Allegations are provided for under subsidiary AFP legislation<sup>59</sup> and deal with internal complaints, that is, by one AFP appointee in respect of another and other complaints concerning non-operational police matters. This distinction between complaints and allegations is further discussed in chapter 14.

### ***Numbers of complaints and allegations***

3.9 The 1995-96 AFP Annual Report records that there were 1 157 complaints made by 740 complainants for that year.<sup>60</sup> 6.3% were substantiated compared to 6.4% the previous year.<sup>61</sup> The Ombudsman has commented that there has been a 24% increase in complaints received about the AFP over the past year.<sup>62</sup> In 1995-96 the Ombudsman states that her Office finalised 737 complaints about the AFP comprising 1 134 complaint issues, compared with 685 complaints finalised in 1994-95. During the year 25% of all complaints were subject to workplace resolution.<sup>63</sup>

3.10 For the year 1995-96, 565 of the total of 740 complainants were from the ACT.

3.11 There were also 79 allegations made as compared to 109 allegations from the previous year. Most of those, as categorised by the AFP, were for disgraceful or improper conduct (27), communicating or accessing information without authorisation (13), failing to comply with General Orders (5) and involvement in any criminal activity (5). Thirty nine of the allegations were concerned with the ACT.

### ***Lodging complaints***

3.12 Complaints may be lodged with the Ombudsman or the AFP each of whom is to record them and notify the other of each complaint received.

### ***Conciliation of some complaints***

3.13 The Act provides for a special procedure for the conciliation of minor complaints.<sup>64</sup> The Commissioner may also make a decision that conciliation should be attempted for those complaints which are not dealt with under the minor complaints procedure but which are received either by the Internal Investigation Division (IID) or by the Ombudsman.<sup>65</sup>

3.14 On 3 April 1995, a more detailed arrangement for the conciliation of complaints was introduced in the ACT as a pilot workplace resolution scheme. It is based on an agreement between the AFP and the Commonwealth Ombudsman and allows sergeants and designated supervisors to resolve non-serious complaints and non-serious allegations internally through conciliation. These workplace resolutions are reviewed by IID and the Ombudsman. The results of workplace resolution may include counselling, apologies and explanations. The AFP and the Ombudsman have assessed this ACT scheme and have concluded that it is successful.<sup>66</sup>

### ***IID investigations***

3.15 The IID is created by the Complaints Act.<sup>67</sup> Its functions are set out in the Act:

- to investigate complaints concerning action taken by AFP appointees that are referred to it by an AFP appointee who has received a complaint or by the Ombudsman;
- to investigate special matters referred to it by the Commissioner.<sup>68</sup>

3.16 The IID has power under the Complaints Act to

- investigate complaints
- further investigate complaints if this is requested by the Ombudsman

- compel answers and the provision of information.<sup>69</sup>

3.17 The investigative powers of the IID are limited to investigation of AFP members only.<sup>70</sup> The IID investigates almost all complaints against the police which are made under the Complaints Act other than minor complaints and complaints which the Ombudsman decides to investigate. At the conclusion of its investigation the IID must provide a report to the Ombudsman.<sup>71</sup> In addition to investigating complaints the IID investigates most allegations (other than minor allegations) which are made pursuant to General Order 6.

3.18 Due to staffing constraints the IID refers approximately 80 complaints each year to 'authorised Officers'<sup>72</sup> who conduct an investigation under the supervision of the Officer-in-charge of IID.

3.19 The IID is directly responsible to the Deputy Commissioner (Administration). Members are appointed to the IID by the Deputy Commissioner for a period of two years.<sup>73</sup> Presently there are 19 members and 3 staff members in the IID.<sup>74</sup> When transferring an Officer to the IID the Commissioner is required to have regard to the nature of the functions of the IID and the need to ensure that there is a member in the IID with experience in criminal investigations and a member with experience in general police duties.<sup>75</sup>

### *The Ombudsman's role in investigations*

3.20 The primary role undertaken by the Ombudsman under the Complaints Act has been to review complaints investigations by the IID. In 1995-96, 208 complaints were investigated by the IID and 18 by the Ombudsman.<sup>76</sup>

3.21 According to the Ombudsman, when she receives a complaint or is notified by the AFP of a complaint, one of her staff writes to the complainant to explain the Ombudsman's role. The Ombudsman's Office then monitors the progress of the investigation, following up with the IID when there is undue delay. The Ombudsman's Office discusses with the Commander of IID any particular issues that require attention. On receipt of the investigation report the Ombudsman examines the evidence and identifies any further action that is necessary. The Ombudsman

- may request interim reports of the police investigation
- may provide progress reports about complaints to complainants
- may determine that a complaint should not be investigated
- may conduct his/her own investigations following an IID investigation.

In limited circumstances, when conducting her own investigation the Ombudsman

- has power to obtain information and documents and any person who is summonsed to provide information does not retain the right to silence
- has the power to enter premises of the AFP or a government department or prescribed authority.

3.22 The Ombudsman has the power to conduct four types of independent investigations.

- Complaints about 'practices and procedures' being to complaints that are about administrative matters, and are very similar to the administrative investigations conducted under the Ombudsman Act.<sup>77</sup>
- Special investigations, conducted after agreement between the Ombudsman and the Commissioner in cases where it is not appropriate for the IID to investigate. These are cases usually involving complaints about IID personnel.<sup>78</sup> There is also an agreement between the Ombudsman and the Commissioner that the Ombudsman will conduct a special investigation into any complaint relating to a death or serious injury of an Aboriginal person or Torres Strait Islander in AFP custody.

- Further investigations where the Ombudsman can conduct investigations following IID investigations. The Ombudsman has rarely exercised this power.<sup>79</sup>
- 'Own motion' investigations where the Ombudsman has the power to investigate actions of AFP appointees on her own initiative.<sup>80</sup>

### ***ISA's role in investigations***

3.23 Internal Security and Audit (ISA)<sup>81</sup> was established by the AFP Commissioner in April 1990. It has no legislative basis and was an internal response by the AFP to the type of problems that the Fitzgerald inquiry<sup>82</sup> exposed in Queensland. Its objectives are to:

- change the culture of the AFP so as to engender an ethos of personal and organisational integrity
- establish and maintain preventive policies, practices and procedures
- maintain a pro-active capacity to investigate corruption, including any link between corrupt conduct and organised crime.<sup>83</sup>

3.24 ISA has 50 personnel, 28 members and 22 staff members.<sup>84</sup> It has three branches: investigations, audit and internal security.

- *Investigations.* ISA is intended to investigate serious criminal and corrupt conduct within the AFP and in particular any links between AFP personnel and organised crime. If ISA is to investigate a complaint under the Complaints Act then it must be authorised to do so.<sup>85</sup> *Audit.* ISA's Internal Audit Branch (IAB) functions are to reform policy and practices in the AFP. It conducts regular audits of different areas of the AFP, particularly high risk areas such as drug holding, cash holdings and financial accounts.
- *Internal security.* This focuses on security policy and training, vetting of staff and ethics education. It also includes the pro-active gathering of information and intelligence on the identity, capabilities, intentions and methods of organisations and individuals who pose, or may pose, a threat to the security of the AFP. It also implements protective security policies and procedures and provides security support.

3.25 In 1995-96, ISA investigated 85 references compared with 87 the year before. The 1995-96 investigations resulted in 16 criminal charges and one disciplinary charge.

## **Criticisms of the AFP complaints system**

3.26 The Commission identified the following major inadequacies of the current system in its draft recommendations paper.

### ***Lack of clear responsibility for integrity of the system***

3.27 The major problem is that there is no one entity who accepts responsibility for the integrity of the system or who can be identified as satisfying that responsibility. The Ombudsman's Office has provided only a limited form of scrutiny that has rarely extended beyond a review of IID investigations after they have commenced or after they are concluded. The Ombudsman has therefore been unable in any unequivocal way to vouch for the integrity and independence of the process. There are many weaknesses in a reliance on the Ombudsman's current limited role as a guarantee of independence. They concern the credibility and effectiveness of the system.

3.28 There is increasing evidence that many complainants and the general public feel uneasy about the police investigating other police. The Ombudsman has said that feedback from complainants and community groups and evidence to the Senate Committee examining amendments to the Complaints Act in 1994 indicate that the public is not confident about the AFP's internal investigations.<sup>86</sup>

3.29 It is clear that there have been many cases under the current AFP complaints system where primary investigation by an external agency and not by the IID would have been preferable, if not demanded, by the circumstances. These include cases of significant public interest or media attention, where there appear to be particularly vulnerable complainants or where there are suspicions of extensive police involvement in misconduct and allegations of cover-up. The Ombudsman has identified cases where much greater input from her Office would have been preferable.<sup>87</sup>

3.30 The Ombudsman's Office only occasionally re-investigates IID investigations and does so in cases where it is particularly dissatisfied with the IID investigation. However, the Ombudsman acknowledges that re-investigation is often ineffectual because of the time that has usually elapsed before it occurs.<sup>88</sup> The trail of evidence is lost or tainted.

### ***Artificial distinction between complaints and allegations***

3.31 The distinction between complaints and allegations is artificial and creates difficulties. Allegations are currently not subject to review by the Ombudsman or by any other external agency but yet it is internal complaints that are most likely to allege or suggest corruption. This distinction therefore is crucial because it severely limits the level of scrutiny for the handling of corruption matters.

### ***Doubts about the performance and skills of the IID***

3.32 Under the current system the IID has a central role in the investigation of complaints. However, the Ombudsman expressed doubts about the current capacity of the IID to perform this role to a consistently high standard. The Ombudsman advised that in the past year her Office has reinvestigated three complaints following investigation by the IID. The Ombudsman claimed that in all three cases her Office was able to identify and gather significant evidence not identified by the IID. In each case the investigation by the IID was found to be inadequate. The Ombudsman claimed that the record of IID investigations is uneven, ranging from very poor to very good. The Ombudsman also expressed concern about inadequate training of IID investigators, commenting that there is no requirement that IID recruits have experience in investigations and that there is no formal training program for those who may need it.

3.33 The Commission expressed concern in DRP 2 that currently the Ombudsman's Office appears to have been unable to provide any comprehensive or effective quality control of the performance of the IID. The reinvestigation of three cases appears to be to be a fairly small sample to help to assess the overall record of the IID.

3.34 The Commission was also concerned about the apparent lack of established guidelines and standards agreed upon by the AFP and the Ombudsman about the staffing, training of the IID and the conduct of investigations.

### ***Role of ISA***

3.35 ISA was introduced not by legislation but by internal arrangement by the AFP in 1990. The Commission expressed concern in the DRP that ISA has not received any legislative recognition but operates as the AFP's major anti-corruption force with significant powers and responsibilities. It uses the full range of investigative tools including listening devices, telephone intercepts and surveillance. Not all of its investigative tools are available to the IID. However, there is no external monitoring of its activities in the same fashion as the IID is oversighted by the Ombudsman.

3.36 Another problem identified in the DRP was that there appears to be no clear delineation between the respective roles of the IID and ISA in investigating complaints. While in general terms ISA has as its stated role the investigation of serious criminal and corrupt activity, serious criminal conduct is not necessarily investigated by ISA. For example, a matter involving murder, grievous bodily harm or serious assault might well be dealt with by the IID unless there were additional elements involved such as an allegation of corruption, an abuse of Office, the involvement of non AFP personnel or the need for surveillance or other sophisticated means of investigation.

3.37 Currently the decision as to whether IID or ISA will investigate a particular matter is a 'judgment call' that is determined generally by conferences between ISA and the IID and the relevant Deputy Commissioner on an ad hoc basis. These decisions can have considerable ramifications. ISA's investigations are very thorough and often require considerable resources and time. There are 26 ISA investigators who between them investigate about 80 matters per year. Of this range of about 80 matters only about ten per cent will result in serious criminal charges.

3.38 The DRP expressed the view that this current ad hoc arrangement is inadequate and should be replaced by an appropriate system of risk assessment and the application of criteria to determine whether a matter is likely to concern serious or systemic corruption or might be best dealt with at least initially by some form of preliminary inquiry before launching a full scale investigation. While the Commission acknowledged that there are difficulties in determining how a particular matter will develop it is essential that a form of risk management is adopted that is based upon experience and precedents and an established database of information.

3.39 The Commission was also concerned that having two separate investigative units is an inefficient use of resources that leads to unnecessary arguments about demarcation and the likelihood of duplication. It can also lead to internal jealousies and empire building with the danger of both bodies seeking to justify their positions, funding and staffing rather than acting on the realities of the task. The general public may also have difficulties in understanding the difference between the bodies and the reasoning behind decisions about who should investigate a particular matter.

### ***Delay***

3.40 The DRP considered that the current system is clearly too slow. Survey evidence and the Commission's consultations and submissions showed that delay is one of the most consistent criticisms made of complaints systems by complainants and by those who are the subject of complaints.

3.41 The Ombudsman agreed that the current response to complaints was too slow. The Ombudsman said that the average time to finalise complaints against the AFP is almost six months. This includes cases handled quickly by conciliation and those not investigated. This is by far the longest average for all agencies investigated by the Commonwealth Ombudsman - for most of them it takes less than two months to finalise complaints. Therefore, there are a large number of investigated cases which take more than six months to finalise. In respect of complaints closed in 1994-5 the Ombudsman reports that 16.8% took 6 to 12 months to finalise, 12.7% took one to two years and 3% took more than two years.<sup>89</sup>

3.42 The AFP also acknowledged that delays occur from time to time but stated that the majority of complaints handled by the AFP are completed and reports forwarded to the Ombudsman within a reasonable time. The AFP claimed that lengthy delays sometimes occur when awaiting reviews by the Ombudsman. These delays can occur if the Ombudsman requires the AFP to take additional action. The AFP advised that for the reporting year 1994-95 the average time taken by the IID to complete investigations was 74.6 days.<sup>90</sup> For the same period the average time taken by the Ombudsman to review and finalise work on complaints was 114.2 days.<sup>91</sup> According to the AFP, another factor that contributes to delay is where there is a protracted court or tribunal hearing.

### ***Lack of assessability***

3.43 The research available indicates that there is a lack of awareness and knowledge about complaints systems particularly for people from a non English speaking background, Aborigines and Torres Strait Islanders and youth.<sup>92</sup>

3.44 The limited research on public awareness of complaints systems indicates that it is least accessible to those who need it most: people from non-English speaking backgrounds, indigenous people and youth, who each have a disproportionately high incidence of contact with the police.<sup>93</sup> A report by the Administrative Review Council found significant impediments to the use of administrative review amongst ethnic communities. There was an apparent ignorance of the administrative review system, significant language difficulties, cultural alienation and a lack of faith in the usefulness of the system.<sup>94</sup> Similarly, the Royal Commission into Aboriginal Deaths in Custody found that police complaints mechanisms were inaccessible

to Aboriginal people, partly because they were overly formal.<sup>95</sup> The report of the National Youth Affairs Research Scheme (NYARS) found that juveniles rarely lodged police complaints, despite believing that their rights had been abused by police.<sup>96</sup> Possible reasons for the lack of access to and use of the complaints system include:

- lack of knowledge of the nature and the availability of the system itself
- lack of trust in the police
- fear of retaliation if a complaint is made
- lack of faith in the complaints system - either due to a belief that investigations are inadequate, or even if adequate, that no useful outcome will be reached
- language difficulties
- barriers created by the police to those wishing to make a complaint.

3.45 The Commission's consultations indicated that ACT residents may have a greater awareness of the AFP complaints mechanism compared to other communities. The Commission's consultations in Norfolk Island suggested that there is little awareness in that community about the role of the Commonwealth Ombudsman.

3.46 The Ombudsman had advised that limited resources have restricted her capacity to implement programs to promote awareness. The Ombudsman chose not to comment on the DRP proposals in relation to the external territories.<sup>97</sup>

#### ***Lack of common database***

3.47 The Commission commented in the DRP that there is no common complaints database used by both the AFP and the Ombudsman's Office. For example, the two agencies employ totally different methods of assessing the number of complaints from any one incident. This means that at the most basic level there is no agreement on the total number of complaints. Nor do the Ombudsman's Office and the AFP have any common information technology that would enable them to record and pass on information to each other virtually simultaneously.

#### ***Lack of common or comprehensive classification system***

3.48 The Commission commented in the DRP that there is no effective system available to the AFP or the Ombudsman's Office for classifying complaints according to their seriousness or their nature. Thus, for example, the AFP data on the classification of complaints contained in its Annual Reports has the classifications 'assault' and 'use excessive force' with no explanation as to the difference between these two categories. The Ombudsman's Office has statistics on the number of matters conciliated but is unable to provide data on other types of complaints in terms of seriousness or other characteristics.

#### ***Criticisms of the performance of the Ombudsman's Office***

3.49 The Commission criticised in the DRP the performance of the Ombudsman's Office in relation to AFP complaints. The Commission considered that the Ombudsman's Office could have tried to use its powers more robustly than the record of activity since the introduction of the Act indicates.

3.50 The Ombudsman had advised the Commission that the failure of her Office to carry out her own investigations or to effectively supervise the IID in these types of matters is due to a lack of resources and the restrictions imposed upon her role by the Complaints Act. The Ombudsman argued that the following interpretation of the Complaints Act has restricted her role:

- The Ombudsman is unable to make the initial assessment about who should investigate a complaint.<sup>98</sup>

- The Ombudsman has no power to supervise IID investigations because apart from the power to obtain progress reports the Ombudsman has no statutory power to influence the IID investigation in any way.<sup>99</sup> The Act gives the Officer-in-Charge of the IID the power to conduct the investigation as she or he thinks fit.<sup>100</sup>
- The power for the Ombudsman to conduct special investigations where it is not 'appropriate' for investigation by the IID is a power that must be interpreted in the context of the philosophy and mandate provided by ALRC Report 9 to the effect that it would a rare case where the IID would not be conducting the investigation.<sup>101</sup> Moreover the Ombudsman's power to conduct special investigations in appropriate cases requires agreement by the AFP Commissioner or failing that a report to the Minister.

3.51 The Commission considered that these views are unnecessarily restrictive. It noted in the DRP that the Ombudsman's range of investigatory powers had not been subject to expert legal opinion, particularly from the Attorney-General's Department. The Ombudsman's Office had not taken the opportunity to test the extent of those powers when it has been clear for some considerable time that the system has not achieved its objectives.

3.52 The Commission argued in the DRP that the legislation should be considered in the clear context that the Ombudsman's Office is to provide effective external review of the AFP complaints system. For example, it is the Ombudsman who may determine that a complaint should not be investigated<sup>102</sup> and it is the Ombudsman who can make reports and recommendations after investigations are carried out.<sup>103</sup> It is also the Ombudsman who has the reporting role to the complainant.<sup>104</sup> The key role of the Ombudsman's Office as the external agency is clear.

3.53 The Commission was not convinced that the Act prevents the Ombudsman's Office from taking a more active role. For example, the AFP is under a duty to notify the Ombudsman of every complaint received by it.<sup>105</sup> It should be possible for the Ombudsman to obtain a reasonably early view about which complaints require greater involvement or supervision. Under s 46 there is power for the Ombudsman to request that her Office or another person undertake an investigation where an IID investigation would be inappropriate. It would be open to the Ombudsman to use this power to investigate herself or to get others to investigate a far greater number and range of matters than has been investigated by that means. Under s 23(1)(a) the Ombudsman is to investigate a complaint that is in substance about the practices and procedures of the AFP. This power could be construed quite widely to allow much more involvement from the Ombudsman's Office.

3.54 Section 35 enables the Ombudsman to request progress reports from the IID, to discuss the complaint with the complainant, to request the Commissioner for access to any documents and to interview a person other than the complainant in relation to the complaint. In addition since 1993 the Ombudsman has had an 'own motion' power which has been used very rarely.

## **Submissions and consultations**

### ***Members of the public***

3.55 The perspective of members of the public who made submissions or who attended consultations was that the current AFP complaints system was significantly defective. The main concerns expressed were about the quality and impartiality of IID investigations, the ineffectiveness of the Ombudsman's role and the inaccessibility of the system. The Commission did not receive any response from members of the public to the effect that the current system worked well or was satisfactory.

3.56 Two submissions from ex-AFP Officers criticised the performance of the Ombudsman in relation to a number of their complaints including failure to keep complainants adequately informed, delays in investigating complaints, failures in administrative procedures and failure to investigate matters because they were in the Ombudsman's opinion too old.<sup>106</sup> One of these complaints was made on 16 October 1992 in relation to matters that were dealt with in a committal hearing completed on 25 January 1990. Some of the matters also related to alleged incidents as far back as 1984. The allegations concerned improper conduct by a number of AFP investigators and DPP Officers.

3.57 Another ex-AFP Officer made allegations that the IID had destroyed evidence, coerced witnesses and had a disregard for its own Orders.<sup>107</sup> He had asked the Ombudsman to investigate but had been advised that there was a jurisdictional problem in that the Ombudsman had no formal power to investigate allegations. He told the Commission that he viewed the Ombudsman's Office as a 'paper tiger' that does not provide effective or unbiased review. He argued that the police should not investigate themselves because they were biased and would support their friends. A separate external review mechanism was necessary to overcome the 'club' mentality of the police.

3.58 There were concerns expressed about the impartiality of the IID investigations of the complaints arising from the AIDEX demonstration. One person consulted thought that the investigation of the AIDEX demonstrations was inadequate. He said that the IID asked a number of questions that were a fishing expedition to find out details about protesters and their supporting groups. He said that the making of anonymous complaints had been noted on some people's social security files presumably after information given by the AFP. Another person consulted said that the AIDEX investigations resulted in very little positive action in relation to most complaints.<sup>108</sup>

3.59 Another submission criticised the independence and thoroughness of IID investigations.<sup>109</sup> The Commission also heard a claim that an attempt had been made by the IID to dissuade her from pursuing a complaint about an investigation by the IID into her son's death.<sup>110</sup>

3.60 Another view was that the Ombudsman's lack of resources meant that the Ombudsman often had to take the IID initial report at face value.<sup>111</sup> Other submissions criticised the Ombudsman's failure to investigate particular allegations of corruption and conspiracy.<sup>112</sup> Another person consulted said that he had 'hit a brick wall' in complaining to the Ombudsman's Office which had advised him that his complaint about the conduct of the AFP did not warrant investigation.<sup>113</sup> One submission commented on the ineffectiveness of the Ombudsman's Office in investigating complaints across the broad spectrum of administration.<sup>114</sup> There was a lack of independence, accountability and staff with appropriate skills and aptitudes.

3.61 A few people consulted suggested that the complaints system needed to be better publicised including the role of the Ombudsman.<sup>115</sup> It was suggested that many people, particularly outside of Canberra, are unaware of the Ombudsman's role.<sup>116</sup>

#### *Views of some practitioners*

3.62 An Official Visitor from the Belconnen Remand Centre who is also a member of the Prisoner's Aid Society was concerned about the low substantiation rate of complaints. He said that many of his clients felt powerless after they claimed that they had been assaulted by the police.<sup>117</sup> He added that another major concern was the wrecking of homes by police squads in drug related matters. Many were reluctant to make complaints against the police as they feared retaliation. The Official Visitor believed that the IID tended to err on the side of the police because there is always some degree of doubt in a matter. The Ombudsman's Office virtually had to accept IID findings because it lacked the resources and the clear powers to do anything else.

3.63 Ms J Saunders, a lawyer with the ACT Legal Aid Office who practices in criminal law and acts on behalf of many complainants, agreed with the criticisms made of the current AFP complaints system in the DRP.<sup>118</sup> She added that the current complaints system was also a very expensive one. The expense arises in the number of challenges to police decisions including those of the IID, challenging evidence in expensive appeals and what seems to be a large number of expensive compensation payments to victims of police misconduct. She also submitted that the arrangements between the Ombudsman's Office and the IID appears to outsiders to be collusive. She added that this may be illusory, as she is not ascribing any bad faith to any Officer of the Ombudsman's Office. However, according to her, there is no question that this is certainly the impression that complainants have of the Ombudsman's Office in these matters.

3.64 She also commented that delays were a significant problem and that both the IID and the Ombudsman's Office contributed to those delays.<sup>119</sup> It was her experience that the Ombudsman's Office did not report back to the complainant during the course of an investigation as it is obliged to. She could not recall one occasion when she had received a progress report regardless of the length of time involved. She was also concerned that there have been a number of cases where a complaint has become 'lost' between the Ombudsman's

Office and the IID. She was also aware of cases where the complaints were made directly to the IID and the IID had subsequently denied to the Ombudsman's Office that the complaint was ever made. Those complaints have then been eventually found with no work done on them until quite some time later.

### ***Views of AFP personnel***

3.65 The Commission consulted widely among AFP personnel including at each AFP regional headquarters and also at Jervis Bay and Norfolk Island. This usually involved meetings with senior personnel and general musters where Officers of varying seniority attended. The overall view was that IID and ISA were effective and impartial. There was a mixed response to the performance of the Ombudsman's Office.

3.66 A number of AFP Officers ranging in seniority told the Commission that IID and ISA were effective and that a more external model would only be needed for the sake of appearances and to satisfy some elements of the community.<sup>120</sup> IID and ISA conducted very thorough and impartial investigations.<sup>121</sup> A number of Officers argued that the IID and ISA were very tough on police they investigated<sup>122</sup> and might use minor infractions, for example, a failure to keep full details in a diary, when they were unable to find any serious allegations.<sup>123</sup> The performance of those AFP Officers involved in the NSW Royal Commission into Police demonstrated the skills and professionalism of AFP investigators.<sup>124</sup>

3.67 Some Officers thought that the Ombudsman's Office was not equipped and lacked expertise to conduct investigations into serious criminality.<sup>125</sup> One view was that the Ombudsman's Office lacked the capacity and commitment to probe deeply enough.<sup>126</sup> Some AFP Officers believed that the Ombudsman's Office could provide some value to the process by jointly participating in investigations.<sup>127</sup> Other Officers were very opposed to this suggestion. Others thought that while the Ombudsman's Office should not conduct investigations itself into serious criminality or corruption it could oversight their investigation.<sup>128</sup>

3.68 Another view was that although the Ombudsman's Office had exercised quite an active role in investigations by sitting in on interviews or in locating evidence the significant powers such as taking evidence on oath had been under-used.<sup>129</sup>

3.69 Many AFP Officers consulted at general musters believed that the Ombudsman's Office and practices were biased against the police and politicised the complaints system.<sup>130</sup> The role of the Ombudsman's Office in the AIDEX demonstrations was often cited as an example. The Ombudsman's Office was claimed to be a 'vindictive and vexatious prosecutor'.<sup>131</sup>

3.70 A common concern was delay.<sup>132</sup> This caused great stress, frustration and uncertainty for the Officers concerned. There was often a long delay between the IID investigation and when the Ombudsman's Office advised the Officer of the outcome.<sup>133</sup>

### ***Views of a former Commonwealth Ombudsman, Professor Dennis Pearce***

3.71 Professor Dennis Pearce, a former Commonwealth Ombudsman, noted that the performance of the Ombudsman's Office in handling police complaints was the subject of significant concern and criticism.<sup>134</sup> He said public concerns have been expressed about delay and there is a widespread view that the Ombudsman's intervention has little impact on the AFP. Professor Pearce said that the improvement in the performance of the Ombudsman's Office since the Senate Committee report in 1991 was 'marginal'.

### ***Views of the Inspector-General of Intelligence and Security***

3.72 The Inspector-General commented that the inadequacies of the current AFP complaints system as identified in the DRP are very real and require urgent attention.<sup>135</sup> He strongly agreed with the view in the DRP that 'the current systems do not deliver sufficient independent scrutiny, accountability, credibility, effectiveness or timeliness.' He was not critical of the performance of the Ombudsman's Office, believing it has done 'some good work in this field' despite various resource and legislative limits.

### ***Ombudsman's submission***

3.73 The Ombudsman agreed with the Commission that the current system is significantly defective and that major objectives are not being met.<sup>136</sup> However, the Ombudsman argued that those deficiencies are not the responsibility of her Office.

3.74 The Ombudsman in her response to the DRP has accepted that 'in the past' the Ombudsman has played a 'limited role' in the AFP complaints system but has argued that this has been dictated by Parliament and limited resources.

3.75 According to the Ombudsman the 'potential' for the Ombudsman to be more effective and proactive has already been demonstrated in cases her Office has investigated in the past year or so, including a number of own motion investigations. The Ombudsman advised that the implementation of workplace resolution and other streamlining of less serious complaints has also enabled more resources to be directed to serious complaints and re-investigations. With the agreement of the AFP the Ombudsman's Office has also supervised several internal investigations of serious complaints. She argued that there has been no lack of will for her Office to undertake independent investigations or to supervise IID's investigations - the limits are caused by funding and the legislation.

3.76 ***Legislative limits.*** The Ombudsman submitted that when the government at the time conferred the AFP complaints function on the Ombudsman it made very clear that the Ombudsman's investigative role was to be limited. In the Second Reading Speech introducing the Complaints Act, the then Attorney-General said

[T]he first of these elements is use of the Ombudsman as 'neutral territory' for the receipt of complaints, as the investigator of last resort and as public guardian to ensure that adequate and proper steps are taken in relation to complaints.

3.77 According to the Ombudsman the resources provided at that time to the Office reflected the Government's expectations that the role was essentially to review police internal investigations.

3.78 The Ombudsman also contended that the Complaints Act makes it clear that the internal investigation is conducted as the IID thinks fit. The Ombudsman conceded that she has a 'degree of influence' as a result of her power to send a case back for further investigation but that this is dependent on IID's 'capacity and willingness'.

3.79 The Ombudsman's Office has also brought to the attention of the AFP problems of delay, lack of adequate case management, lack of adequate training for internal investigators and examples of inadequate investigations.

3.80 ***Ombudsman's achievements.*** The Ombudsman has also provided details to the Commission of what she considers to be significant examples of her Office's achievements in the AFP complaints area. These are listed as follows.

- The Ombudsman's report into the AIDEX demonstrations resulted in recommendations to the AFP about case management, training and recruitment of suitable Officers. Her Office subsequently pursued these issues through a joint working party with the AFP and in direct approaches to Deputy Commissioners. A number of the recommendations 'are being pursued'.<sup>137</sup>
- Three re-investigations of inadequate internal investigations relating to obtaining and executing search warrants. These re-investigations resulted in new findings and recommendations about search warrant procedures.
- An own motion investigation into a number of complaints received about the accessing or disclosing of information that resulted in recommendations about training and education. The Ombudsman advised that the AFP Commissioner was generally supportive of her recommendations.

- An AFP investigation conducted by AFP Officers under the direct and active supervision of an Ombudsman staff member about improper inducements allegedly made by an AFP Officer to prisoners to give evidence.
- The Ombudsman conducted a re-investigation in relation to a Motor Traffic report.
- A current 'own motion' investigation into AFP treatment of youth.
- Interviewing and reviewing documents with the AFP in relation to an AFP Officer who 'rolled over' before the NSW Royal Commission into the Police. The Ombudsman recommended that a Ministerial inquiry be conducted because the allegations are so serious and wide ranging that the Ombudsman does not have the resources to conduct it.
- The Ombudsman has influenced a wide range of AFP practices and procedures, guidelines and training including use of force training, a reporting policy for whistleblowers, witness protection and video cameras in watchhouses.

3.81 *Comments in relation to specific criticisms.* The Ombudsman has accepted the validity of the specific criticisms made in the DRP subject to the following minor qualifications.

3.82 In relation to the problem of delay, the Ombudsman has queried some of the information provided to the Commission by the AFP. The Ombudsman submitted that the period of 114.2 days mentioned by the AFP for her Office to finalise complaints refers to the time taken to finalise complaints following the IID investigation. The Ombudsman maintains that this average is largely taken up by the time when complaints are back with the IID for further inquiries or information, with other parts of the AFP for disciplinary action or compensation or with the Australian Government Solicitor for advice. The Ombudsman submitted that in fact in 1995-96 the average time taken by her Office for the initial review of IID reports is 23.7 days.

3.83 The Commission's response to this qualification is that it does not controvert the existence or the seriousness of delays. It is simply a difference of view between the Ombudsman and the AFP as to who should bear the most responsibility for the delays that occur.

3.84 A second qualification by the Ombudsman is that her Office introduced a complaints classification system in May 1993 that does provide a detailed breakdown of the nature of complaints. The Ombudsman argued that the seriousness of complaints can be assessed by their nature (for example, rudeness compared to assault). The Commission's view is that while it is of some use, the classification system mentioned by the Ombudsman does not provide sufficient information about the seriousness or nature of complaints. For example, it has the categories of threat, intimidation, harassment, misuse of authority, assault and excessive force but there is no explanation of the differences between these categories where there would appear to be scope for considerable overlap.<sup>138</sup> A useful addition would be data that categorised complaints more directly by their seriousness, for example, in the four categories that the Commission has recommended that the NIIC should employ.<sup>139</sup>

3.85 The Ombudsman has also advised that the lack of a linked database with the AFP is essentially a resources issue. According to the Ombudsman, the additional significant funding which would be needed to develop a specific AFP complaints database, linked to the AFP but protecting the rest of the Ombudsman's database, has not been available. The Ombudsman did not provide any detail on the amount that would be required to develop a linked system nor what it would entail. In the Commission's view a linked database would make the system more efficient by reducing the amount of administrative work needed by both the AFP and the Ombudsman and also by preventing duplication of effort. It is therefore a cost effective measure that should also reduce delays and cases where files going missing or to the wrong place.

#### ***Commission's response to the Ombudsman's submission***

3.86 The Commission has considered the Ombudsman's response but maintains its view that the performance of the Ombudsman's Office in the area of AFP complaints has been inadequate. As Professor Pearce has

commented, any improvement since 1991 has been marginal and in 1991 the Senate Committee assessed the performance as clearly unsatisfactory.

3.87 The Commission does not accept that this inadequate performance is explained by lack of resources and legislative limits.

3.88 The Commission considers that the suggested legislative limits should not have restricted the Ombudsman's Office in the manner and to the extent that the Ombudsman has suggested. The Second Reading Speech which refers to the role of the Ombudsman as a primary investigator of last resort was made some years ago before the system was operational. Moreover, that speech also refers to the Ombudsman as being 'public guardian to ensure that adequate and proper steps are taken in relation to complaints'. The Commission's view is that the Ombudsman's Office has not been able to meet that responsibility.

3.89 The Ombudsman seeks to rely on that Speech to demonstrate that the Ombudsman's Office was not initially expected to directly investigate many complaints. But even if this is accepted, the Ombudsman's Office has been unable to provide an effective oversight of IID investigations.

3.90 The Ombudsman in her response has not disputed the views in the DRP about ways in which the Ombudsman's Office could have taken a more expansive view of its role. Moreover, her own submission shows that there was considerable scope for her greater involvement. For example, the Ombudsman advised that her Office recently with the agreement of the AFP supervised several internal investigations of serious complaints. The legislative limits apparently did not prevent this arrangement. It is unclear how they prevented it in the past. There is no evidence available to suggest that the AFP has been intransigent or indeed even opposed any greater activity by the Ombudsman's Office. The Ombudsman has not suggested that the AFP has opposed any greater involvement by her Office in overseeing IID investigations. The Ombudsman herself notes in her 1995-96 Annual Report that the Commissioner has never withheld his agreement for the Ombudsman's Officers to investigate a complaint from the beginning.<sup>140</sup>

3.91 The Ombudsman's Office states in its recent Annual Report that the legislation does not allow it to set time limits on internal investigations. In the Commission's view there is nothing in the legislation to prevent the Ombudsman's Office from making an arrangement with the AFP to set time limits.

3.92 The same reasoning applies to introducing case management practices. The Ombudsman's Office in its latest Annual Report comments that it is 'concerned' that IID case management practices are 'inadequate'. There is nothing in the Complaints Act to prevent the Ombudsman's Office and the AFP from implementing proper case management guidelines and practices.

3.93 The Ombudsman referred to the general provision that the internal investigation is conducted as the Officer-in-charge of the IID sees fit. This should be read in the context of the Ombudsman's clear role to scrutinise those investigations and where appropriate to send a case back for further investigation.

3.94 The Commission is concerned that measures such as time limits and case management guidelines have not been introduced in circumstances where difficulties with delays and the quality of investigations have been recognised for some time.

3.95 The Commission notes that the Ombudsman has also advised that her Office has assisted the AFP in training and in the development of procedures, for example, for witness protection and force training. These are matters that are not provided for under the Complaints Act. However, the Ombudsman's Office has managed to carry them out without impediment from 'legislative limits'.

3.96 **Funding.** The Ombudsman has argued that a lack of resources has also contributed to her Office's incapacity to effectively perform its functions. The Commission has requested information about how much the Ombudsman has spent on AFP complaints. This is further discussed in chapter 8. The figures provided by the Ombudsman suggest that her Office has actually progressively spent less on police complaints over the last three years. The Ombudsman has now advised the Commission that there may be some misunderstanding on this point. The Ombudsman has advised that in the past year or so her Office has increased the resources used on police complaints and in particular on independent investigations. According to the Ombudsman, this has partly been a result of increased streamlining within the Office which has

enabled her to redirect resources towards more serious complaints. The Ombudsman added that her Office has also 'at times used resources from other parts of the Office to enable short term increases in my focus on police complaints'.

3.97 The Ombudsman has provided no details on the frequency or the amounts of these extra payments, nor what they have been spent on. As for the other point of the increased streamlining this would seem to be a matter of semantics. On the Ombudsman's own estimates the total amount spent by her Office on police complaints has decreased - the Ombudsman's Office may have redirected how this money is spent but the total spent has fallen.

3.98 The Commission is not in a position to conduct an audit on how the Ombudsman's Office has used its resources across its jurisdictions. However, the Commission would have expected that police complaints should have been a major priority and therefore received considerable resources and attention. The information on the Ombudsman's spending does not suggest that this has been the case. Nor does the fact that there has been no staff member dedicated to the AFP police complaints function.

3.99 Moreover, the Commission considers that many improvements to the effectiveness of the complaints system could have been carried out with little expenditure of resources. For example, implementing adequate procedures and case management guidelines would not have required much expenditure. The Ombudsman has advised the Commission that she has recently restructured her Office to enable all police complaints to be handled within the one section. This appears to be a relatively simple matter that could have been attended to some time ago.

3.100 ***Ombudsman's achievements.*** In the Commission's view the Ombudsman's 'list of achievements' does not demonstrate any pattern of consistent or significant progress. The Commission is unsure in relation to those matters about the extent to which the Ombudsman has conducted primary investigations herself and what amount of investigative effort was required.

3.101 For example, in relation to AIDEX, the Ombudsman's Office did not conduct one primary investigation. It reviewed IID investigations. The history of the Ombudsman's involvement in this matter also demonstrates the delays and inefficiencies of the current system. The demonstrations took place in November 1991 but it was not until September 1993 that the Ombudsman's Office released its report. A few of the Ombudsman's recommendations have been implemented but some are still subject to further discussion with the AFP in working parties. That is, it is almost five years after the events took place and the matter has not yet been fully resolved.

3.102 The Ombudsman's 'own motion investigation' into unauthorised access and disclosure of information appears to be constituted by the Ombudsman's Office looking at a number of complaints together to establish that there was a problem area. The Ombudsman's Office does not appear to have actually carried out any primary investigations.

3.103 These achievements in terms of actual investigations break down to a handful of own motion matters and few re-investigations. They ought to be assessed in this context. In 1994-95 the Ombudsman's Office stated that it investigated 8 complaints while the IID investigated 276. In the 1995-96 Annual Report, the Ombudsman's Office records that the IID investigated 208 compared with 18 by the Ombudsman's Office. In 1994-5 the Ombudsman's Office re-investigated only one case compared with three in 1995-96. The Commission is unable to comment on the complexity or level of investigation that the Ombudsman's Office carried out in these 'primary investigations' or re-investigations.

3.104 The Commission is not suggesting that the work that the Ombudsman has mentioned as achievements was not necessary or useful. However, in the Commission's view, it does not constitute a record of sufficient or regular involvement in the AFP complaints system.

#### ***Submission by then Parliamentary Commissioner for Administrative Investigations (Western Australia)***

3.105 The former Parliamentary Commissioner, Mr Robert Eadie, considered that the Commission's criticisms of the performance of the Ombudsman's Office were unfair.<sup>141</sup> In his view the Commonwealth Ombudsman has achieved a considerable amount given the restrictions on resources and effective powers.

Complaints about the effectiveness of independent bodies such as the Ombudsman are commonplace. Disgruntled complainants with jaundiced views of the process and unjustified expectations are not uncommon.

3.106 *Commission's views.* The Commission notes that Mr Eadie's submission did not contain any specific substantiation of his view that the Commission's criticism of the Ombudsman's performance were unfair. This may be because of time constraints on Mr Eadie's capacity to do so in the course of his submission. Nonetheless the Commission must proceed on the information available to it.

3.107 The Commission also notes that views similar to Mr Eadie's were not expressed by the vast majority of those who made submissions or those it consulted. Mr Eadie has also suggested that complaints about independent bodies like the Ombudsman are commonplace. The Commission would agree that there is a tendency for those who have complaints or grievances to contact inquiries such as this rather than those who believe that the system works well. However, the debate about the continued role and the performance of the Ombudsman in this area was the subject of quite extensive media coverage particularly in the ACT where the majority of complaints against the AFP arise.<sup>142</sup> One might have expected that this direct and vigorous debate would have encouraged any person or organisation who in fact does support the Ombudsman's performance and continuation in this role to contact the Commission. But none did.

#### ***AFP submission***

3.108 The AFP submission recognises that there are deficiencies in the current system but did not accept the view that it is 'seriously inadequate'.<sup>143</sup> The submission commented that the AFP had long acknowledged that there are shortcomings with the existing system, especially the review of allegations, the timeliness and cost effectiveness of the system, the role of the Ombudsman, the conduct of complaints and the concentration on particular processes.

3.109 *Commission's response.* The AFP in its submission did not deny any of the specific criticisms that the Commission made in relation to the current system. The AFP makes the assessment that these do not amount to a seriously inadequate system. In the Commission's view those criticisms aggregated show that the current system is failing to meet the most important objectives of a police complaints system - that is, providing accountability, ensuring AFP integrity and public confidence and being timely and cost efficient. It appears to the Commission that this must be construed as a serious systemic failure.

3.110 The only response to minimise this failure is to argue that there are other jurisdictions that are just as bad or worse. The Western Australian Parliamentary Commissioner has suggested that the level of oversight of national law enforcement agencies overseas is no better than in Australia except perhaps for the Netherlands.<sup>144</sup> The Commission does not consider that any solace should be derived from such judgements if in fact they are accurate. The task of this inquiry is to propose a system that constitutes the best possible response, including cost effectiveness, for the NCA and the AFP. The Commission would add that the President of IACOLE has contacted the US Justice Department with a view to it considering the Commission's work on oversight of federal law enforcement agencies.<sup>145</sup>

## **4. A complaints model for the AFP**

### **Introduction**

4.1 Chapter 3 concluded that there are major inadequacies in the working of the AFP complaints system. This chapter considers possible responses including wholly external investigations and models that involve greater levels of investigation and management by external agencies. The chapter argues that the current AFP complaints model is a defective one because it relies on internal investigation with external oversight.

4.2 The crucial question then is what is the most appropriate investigative model to remedy those defects and to satisfy the major objectives of law enforcement complaints systems that were identified in chapter 2. The fundamental issue is to determine the appropriate combination of internal and external investigation.

4.3 The chapter concludes that none of the existing models is completely suitable for responding to complaints and corruption involving the AFP. It therefore proposes that a hybrid model that has some of the characteristics of these other models but is a specific response to the circumstances of the AFP is the most appropriate response. The Commission recommends the establishment of a new body, the National Integrity and Investigations Commission (NIIC) to be responsible for investigating or controlling the investigation of AFP complaints and corruption investigations. The reasons for that preference are dealt with in detail in chapter 9. The nature of the NIIC and how it would work in practice are discussed in chapters 6 and 7.

### **Existing investigative models**

4.4 The DRP suggested that there were four main options to consider and assessed each of them. The four options were

- a wholly internal investigation model (the current NCA complaints model)
- a wholly external investigation model
- internal investigation with external oversight (the current AFP complaints model)
- a combination of internal and external investigations (the Commission's preferred option).

### **Option 1. An internal investigation model**

4.5 This model would mean that the particular law enforcement agency would have sole responsibility for investigating complaints against itself or its staff.

#### ***DRP's assessment***

4.6 The DRP commented that this was an outdated concept in Australia and increasingly so world wide. As discussed in chapter 9 there is very little support for a return to this format in Australia. It fails to meet vital objectives for police complaints systems such as ensuring public confidence.

### **Option 2. An external investigation model**

4.7 Under this option an external agency would carry out all the main functions of the complaints system. This would mean that the external agency would have its own investigation unit which would conduct all investigations or the vast majority of them. The AFP would have no role or be limited to passing on information to the external agency.

#### ***The DRP's assessment***

4.8 The DRP commented that this model has considerable superficial attraction as it is the model most likely to engender the greatest initial public confidence. It gives as much power and responsibility as possible to an

external agency. It therefore deals with concerns about the lack of effectiveness or objectivity of internal investigations.

4.9 However, the Commission did not support this option because

- the agency must be given managerial responsibility to deal with complaints that are generated by its own officers
- the option would limit agencies in using complaints as a management tool for identifying where changes in policy and practices may be necessary
- faced with a completely external complaints and discipline authority it is likely that law enforcement agencies, particularly their middle managers, will simply absolve themselves of responsibility for making the system work
- a completely external body might reduce the chances of internal institutional reforms designed to reduce complaints in the first place<sup>146</sup>
- a completely external unit would become in effect an alternative police force and may itself develop some undesirable aspects of culture such as defensiveness and insularity
- it would be difficult to ensure that there are sufficiently experienced and trained civilian staff to investigate all complaints that warrant investigation
- the national roles of the AFP and the NCA mean that it would be costly to have a completely external investigation unit with sufficient resources and expertise to service the whole of Australia
- a completely external process will create delays and duplication because it is likely that the police will still have to conduct at least some preliminary inquiries to establish the nature of the complaint and to process it.

As far as the Commission is aware there is no police complaints system anywhere in the world which has a wholly external investigation model.

### **Option 3. Internal investigation with external oversight**

4.10 This model broadly describes the current AFP complaints system and those of the Australian States and the Northern Territory. The Queensland CJC has a different approach which is discussed at paragraphs 4.18-24. However, for the Commonwealth, Victoria, Western Australia, the Northern Territory and Tasmania review of complaints against the police is part of the responsibility of an Ombudsman's Office or similar body which has wider responsibilities to review government activity. South Australia has the Police Complaints Authority who can be described as a specialist Police Ombudsman.

4.11 In these jurisdictions other than Queensland the majority of investigations are carried out by the internal investigation units of the respective police services. In general terms the external agency has a power to conduct its own independent investigations where

- the complaint concerns a police officer senior to all members of the internal unit
- the complaint concerns a member of the unit
- the complaint relates to a matter the external agency is already investigating
- the external agency is of the view that it is in the public interest that the complaint be investigated by the agency.<sup>147</sup>

4.12 These agencies may also monitor and review initial investigations by the police, directing them to conduct further investigations. However a common observation by external agencies in Australia is that they lack the resources to conduct investigations themselves into as many of the complaints as they would like. In particular, they are unable to initiate and conduct investigations in cases where the complaints involve serious allegations, where there are particularly vulnerable complainants eg the young, or people from a non-English speaking background or where matters of significant public interest are raised.

4.13 This basic model is used widely overseas in comparable countries to Australia including New Zealand, England, Northern Ireland, Republic of Ireland, Scotland, Wales and a number of jurisdictions in Canada and the United States. The issues paper and the DRP described some of these overseas systems.

#### ***Commission's assessment***

4.14 The Commission in the DRP considered that, while this model may have been innovative in the 1970's, it is now ill equipped to cope with the increasing demands for greater accountability of the police and for an effective response to police corruption.

4.15 The model relies on the internal investigation unit investigating the bulk of complaints and for the external overseer to investigate in exceptional cases. However, the number of cases that are actually investigated by the external agency appear on the whole to be inadequate for the effective and credible working of the system. Many of these external oversight agencies do not or cannot fund their operations so that they are able to conduct their own investigations in anything but a few cases and their monitoring of internal investigations tends to be patchy and often confined to a review of the papers. Moreover, because the agency has the task of reviewing or monitoring the whole range of complaints, scarce resources are often allocated to the minimal task of maintaining the system without any strategic targeting of serious or 'high risk' cases.

4.16 The DRP identified the following as major weaknesses in this model

- it does not create sufficient public confidence in the impartiality and thoroughness of the investigation process
- there are many examples of ineffective internal investigation units
- a negative police culture militates against impartial and effective complaints handling by the police
- the model does not provide any effective mechanisms to prevent or detect corruption.

### **Option 4. Combination of internal and external investigations**

4.17 A few jurisdictions have developed models which combine internal and external investigations.

#### ***The CJC model***

4.18 Review of complaints against the Queensland Police is conducted by the Criminal Justice Commission (CJC) which was established in 1990 following upon the recommendations of the Fitzgerald Inquiry. The CJC is not a body solely concerned with police complaints, but instead has various functions and responsibilities in criminal justice. The CJC's functions include

- investigating official conduct in units of public administration and alleged or suspected misconduct by members of the Queensland Police Service (QPS)
- monitoring, reviewing, co-ordinating and initiating reform of the administration of criminal justice
- overseeing criminal intelligence matters and managing criminal intelligence
- providing witness protection

- in certain situations, investigating organised or major crime
- overseeing and reporting of reform of the QPS
- providing policy directives and recommendations with respect to law enforcement priorities, education and training.

4.19 The Official Misconduct Division (OMD) is the investigative unit within the CJC and it investigates cases of alleged or suspected misconduct by members of the QPS. However, it also reviews minor complaints that are investigated and dealt with internally by the QPS. The QPS must report all complaints of misconduct to the CJC.

4.20 Complaints against members of the QPS are divided into three categories:

- *A breach of discipline.* These can commonly be described as a violation or dereliction of duty.
- *Misconduct matters* are more serious and are defined as disgraceful, improper or other conduct unbecoming an officer; or conduct that does not meet the standard of conduct reasonably expected by the community of a police officer.<sup>148</sup>
- *Official misconduct* is the most serious category and involves conduct that constitutes, or could constitute, a criminal offence or disciplinary breach warranting dismissal.

4.21 The QPS is responsible for dealing with complaints involving breaches of discipline.

4.22 If the complaint is assessed as a misconduct matter, the CJC is responsible for its investigation. The OMD can refer cases of minor misconduct back to the QPS for investigation on behalf of the CJC.

4.23 If a complaint is assessed as alleging serious misconduct, official misconduct or is criminal in nature, the CJC retains carriage of the investigation. Such cases are matters usually referred to multi-disciplinary teams for investigation.

#### ***DRP's assessment***

4.24 The Commission did not propose the introduction of the CJC model in its entirety at the federal level. The adoption of a model essentially similar to the CJC would require a major restructuring of the federal criminal justice system. It would involve combining many of the essential elements and agencies responsible for the administration of criminal justice. There appears to be little reason at present to justify such a radical restructuring. The CJC model was a response to findings of systemic failings in the Queensland justice system which were not limited to the police force. The same findings have not been made in respect of the federal system of criminal justice. There are also concerns about the breadth of the Queensland CJC's involvement in the investigation of organised crime and the fact that the Misconduct Tribunals are linked administratively to the investigative division of the CJC.

#### ***Expansion of the ICAC model***

4.25 The NSW ICAC's charter is to expose and minimise corruption in the public sector including the NSW Police Service. Its three main functions are:

- exposing and deterring corrupt conduct by investigating and reporting on allegations of corruption
- corruption prevention
- education about the detrimental effects of corruption and ways to prevent it.

4.26 The NSW Royal Commission examined whether the ICAC should have a dedicated police corruption division within it. It rejected this option for a number of reasons including:

- there is a public perception that the ICAC has failed to tackle police corruption
- a real difficulty exists in structuring a division of the ICAC which could be kept separate and independent from the rest of the organisation
- the other functions of ICAC might mean that competing demands for resources could result in a lack of proper resourcing and attention for the police corruption division.<sup>149</sup>

#### ***DRP's assessment***

4.27 The NSW ICAC has a broad charter to deal with corruption in the public sector. In that sense it extends far beyond dealing with police corruption or complaints. The DRP commented that the question of whether an ICAC with such a broad ranging responsibility is necessary at the federal level is beyond the Commission's terms of reference for this inquiry. However, as noted above, in the context of the NSW ICAC's role in dealing with police corruption the NSW Royal Commission into the Police did not favour a dedicated Police Corruption division within the NSW ICAC.

#### ***The NSW Police Integrity Commission***

4.28 The NSW Royal Commission's Interim Report found that a new complaints and corruption investigation system was necessary in NSW. It proposed a Police Integrity Commission (PIC) that would have as a principal objective the detection and investigation of police corruption. The PIC would be able to investigate itself or manage or supervise the investigation conducted by other agencies. A key function of the PIC would be to assemble admissible evidence when investigations reveal criminal conduct and to furnish such evidence to the Director of Public Prosecutions. It would have the resources to be able to conduct its own investigations with a full range of coercive powers similar to those of a Royal Commission or the ICAC.

#### ***DRP's assessment***

4.29 The model proposed by the NSW Royal Commission places the PIC at the apex of the complaints system but still envisages the Ombudsman providing oversight and auditing of less serious complaints. It is a significantly different approach to the CJC which is a single external agency with sole responsibility for determining the investigation of complaints.

4.30 The DRP considered that the approach proposed by the NSW Royal Commission into the Police would have significant disadvantages if adopted for the AFP.

4.31 The DRP argued that one of the reasons for the serious problems in the NSW police complaints and disciplinary systems has been that there have been too many agencies with some role to play. The NSW police complaints system has input from the NSW police as follows: the Office of Professional Responsibility with its constituents of the Professional Integrity Branch and the Office of Internal Affairs; the Corruption Prevention Unit; the Comprehensive Audit Section and the Operational Readiness Audit Section. The NSW Ombudsman has an oversight role in relation to police complaints and the ICAC could investigate police corruption. Other bodies with a role to play include the Ministry for Police, the NSW Crime Commission and the Police Board of NSW.

4.32 In the Commission's view a multiplicity of agencies increases the potential for fragmented responsibility, for duplication of effort and resources and for individual cases not receiving appropriate levels of attention.

4.33 The NSW Royal Commission while acknowledging that a single agency would have the attraction of simplifying and integrating the process did not favour a single agency because of

- the different approaches needed for the complaints system as opposed to corruption investigation
- the need for a specific focus on corruption with an aggressive and sophisticated investigative capacity, and

- the resources needed for effective monitoring of the complaints system.<sup>150</sup>

The DRP dealt with each of these suggested disadvantages.<sup>151</sup>

4.34 The Commission did not consider that these concerns outweighed the benefits of single external body in the context of the AFP and the NCA. Those suggested difficulties of a single external agency could be overcome with proper planning and commitment to the objectives.

4.35 The Commission acknowledged that complaints and corruption require different approaches but this could be accommodated within a single agency. The Commission proposed that the National Integrity and Investigations Commission (NIIC) as discussed in chapter 6 should have two separate divisions, one dealing with complaints and one with corruption. The Chairperson of the NIIC would have responsibility for overseeing both divisions' work and any co-ordination between them including the movement of matters from one division to another if there was a change in the nature and requirements of the particular matter. However, in the majority of cases matters would be dealt with by the one division.

4.36 The NSW Royal Commission was concerned that the sheer number of police complaints in NSW would swamp a single agency and weaken the focus on serious misconduct and corruption. In its Annual Report 1994-95 the NSW Police Service stated that during that financial year it received 5 537 written complaints containing a total number of 10 172 complaints. The AFP in the same period reported 900 complaints made by 596 complainants. The potential problem of swamping does not appear to be so significant at the federal level. Moreover with the introduction of a national system of streamlined informal resolution for customer service and internal management complaints the input required from the external agency will be considerably less for those types of complaints. They should constitute about 70% of all complaints.<sup>152</sup>

4.37 The DRP proposed that the AFP and the NCA would still play a major role in investigating complaints but that role would be at the formal request of the external agency. The external agency's power to determine the extent of the role of the AFP or NCA was seen to be extremely important when there was a doubt or conflict about the conduct of an investigation. The experience of the CJC did not suggest that discipline in the Queensland Police Service has been detrimentally affected by the CJC investigating complaints against the police. Complaints and discipline are related but nevertheless different processes. The Commission was advocating a reduced role for the AFP and the NCA in the control of the investigation of complaints but an increased role for these agencies in imposing discipline.

4.38 The Commission was of the view that the AFP and the NCA could discharge their disciplinary functions responsibly and effectively with a new disciplinary process as proposed in chapter 10. As discussed in that chapter it would appear that the current AFP disciplinary process has a number of major faults but there is no suggestion that AFP senior management has a record of leniency with officers when imposing penalties for breaches of discipline. On the contrary the Commission considered that the AFP senior management has demonstrated a commitment to impose appropriate penalties that will act as a deterrent to police misconduct. The major problems of the current disciplinary system relate to its characterisation as quasi-criminal with a review and appeal process that has full adversarial hearings with their attendant procedures and technicalities. In effect the current system has hamstrung the AFP in its efforts to achieve effective discipline.

4.39 The Commission did not consider that the introduction of the NIIC would weaken the responsibility or commitment of the NCA or the AFP to take a pro-active stand against misconduct and corruption. The AFP and the NCA would still have primary responsibility for their own internal audit and security, vetting and training of personnel and the conduct of integrity testing and assessment. They would work in co-operation with the NIIC in detecting and investigating corruption and misconduct but there would be no question that final control and decision making rests with the NIIC once it is involved in an investigation.

4.40 The NIIC would be able to make recommendations about AFP and NCA policies and procedures in relation to corruption and other misconduct. The NIIC would also have a research and policy division providing information and data about the effectiveness of the systems. These measures should assist the AFP and the NCA to be pro-active and take effective preventive measures.

4.41 The responses to the DRP have further raised the issue of the NSW Royal Commission's reasoning and recommendations in relation to the expected roles of the Police Integrity Commission and the NSW Ombudsman. This issue is considered in detail in chapter 8.

***Enhanced role for the Commonwealth Ombudsman***

4.42 The Commonwealth Ombudsman submitted that the most effective response in terms of outcome and costs would be to provide her office with enhanced powers and additional resources. The DRP rejected that option. The Ombudsman in her response to the DRP maintained her view. The matter is fully canvassed in chapter 8.

**The Commission's favoured option: a single agency with a focus on handling complaints and anti-corruption policies and mechanisms**

4.43 The DRP assessed all the current major alternatives and considered that each of them was inappropriate for the AFP. It then considered a new approach. It favoured the introduction of a new single external agency, the National Integrity and Investigations Commission (NIIC) to deal with serious complaints and corruption but with the capacity and responsibility to manage or oversight the complete AFP and NCA complaints process. An integrated system with one body assuming primary responsibility was necessary. The reasons for this preference are discussed in detail in chapter 9.

**Recommendation 6 - The National Integrity and Investigations Commission**

A new single agency to be known as the National Integrity and Investigations Commission (NIIC) should be established to investigate or manage/supervise the investigation of complaints against the AFP and the NCA.

## 5. A complaints system for the NCA

### Introduction

5.1 This chapter discusses the most appropriate model for dealing with complaints and corruption in relation to the NCA. The main issue is which agency should provide external review. The chapter canvasses the three main options which are

- the Commission's proposed agency, the National Investigations and Integrity Commission (NIIC)
- the Inspector-General of Intelligence and Security
- the Commonwealth Ombudsman.

5.2 The Commission recommends the NIIC and deals with the relevant arguments in detail.

5.3 This chapter also discusses some special issues that arise when considering complaints against the NCA which relate to its mixed and changing workforce and the nature of its operations.

5.4 The NCA's disciplinary process is discussed in chapter 10 where a separate disciplinary code for the NCA is recommended.

### Background

#### *The NCA's role*

5.5 The NCA is a national law enforcement body whose main role is to counteract organised crime often by working in partnership with other agencies. The NCA's working definition of organised crime is 'a systematic conspiracy to commit serious offences'. Generally, the NCA investigates relevant criminal activities and collects, analyses and disseminates information and intelligence relating to those activities. Where appropriate it establishes and co-ordinates task forces with other law enforcement bodies for the investigation of those matters. It may also make recommendations for legal and administrative reforms.

5.6 The NCA uses multi-disciplinary teams of lawyers, police, financial investigators, intelligence analysts and support staff to investigate organised crime. The Act gives the NCA coercive powers to compel people to produce documents and to give sworn evidence. Those powers are not available to traditional police services. The NCA can only exercise its coercive powers in matters which have been formally referred to it for investigation. These characteristics are meant to enable the NCA to co-ordinate national investigations against major organised crime by complementing the efforts of other law enforcement agencies and by working co-operatively with them.

#### *A mixed workforce*

5.7 The NCA is constituted by the Chairperson and members who are statutory office holders. Members and the Chairperson hold office for a maximum of four years.<sup>153</sup> There are also NCA members of staff. Under the NCA Act, staff of the Authority fall within one of the following categories.

#### *(a) Those employed under the Public Service Act*

5.8 A majority of NCA staff are appointed and employed under the *Public Service Act 1922* (Cth)<sup>154</sup> and the NCA Chairperson has all the powers of a Departmental Secretary under that Act.

#### *(b) Consultants*

5.9 The Chairperson may employ consultants according to terms and conditions as determined from time to time.<sup>155</sup> The argument for making consultants subject to an NCA complaints regime is that if they are not included there may be no alternative method of complaint and discipline in relation to them. In some cases

where the person is a member of a professional organisation there may be a system of complaint and discipline but this system may be removed from the control and responsibility of the NCA.

***(c) Seconded personnel***

5.10 Some personnel may be seconded to the Authority from Federal, State or Territory police services and other agencies.<sup>156</sup>

5.11 All police seconded to the NCA have the status of 'members of staff of the Authority' under the Act. The NCA has entered into memoranda of understanding with the AFP, the Northern Territory and all States except South Australia.<sup>157</sup> The Memoranda cover staffing and the continuation of the respective Commissioner's and members' legislative and operational responsibilities, including discipline. A common period of secondment is two years.

5.12 All State Police seconded to the NCA are subject to the discipline and internal investigation procedures of their home forces. The Queensland, WA, NSW, Victorian and the Tasmanian Police Commissioners have agreed that complaints against members seconded to the NCA will be forwarded to the Chairperson in the first instance. Where the matter warrants formal investigation, the Chairperson will forward the details of the complaint to the relevant police service. This means that the NCA Chairperson is responsible for making an initial decision about whether a complaint warrants further investigation.

5.13 Northern Territory (NT) seconded police are subject to the internal investigation procedures of the NCA or the State Police in the jurisdiction where the complaint was made. The results of the investigation are then forwarded to the NT Police for any disciplinary or other action. The NT Commissioner has agreed that complaints against members of NT police seconded to the NCA in relation to their duties with the NCA are forwarded to the Chairperson of the Authority in the first instance. A copy of the initial complaint is also forwarded to the Commander Internal Audit and Review Division in the NT Police. Complaints are investigated by either officers of the NCA or by police officers from the jurisdiction in which the complaint is made. When the investigation has been finalised, details of the outcome and a copy of the investigation file are forwarded to the Commander Internal Audit and Review Division.

***(d) Legal counsel***

5.14 Some legal practitioners assisting the NCA may be appointed as consultants.<sup>158</sup> It is possible that during litigation counsel may be the subject of complaint. If the complaint concerns an aspect of professional practice then the relevant Bar Association and/or Law Society may become involved and investigation of the complaint and disciplinary action may ensue.

***(e) Task forces***

5.15 Officers of the AFP, State and Territory police services and other agencies may be members of an NCA task force under the NCA Act<sup>159</sup> and are consequently defined as members of staff of the NCA.<sup>160</sup> The NCA seconds staff from agencies such as the Australian Securities Commission, the Australian Taxation Office, AUSTRAC, the Australian Customs Service and State revenue agencies for varying periods of time. Task forces are often established to investigate allegations of significant and wide-scale organised criminal activity that crosses State and Territory boundaries and involves a variety of criminal activity such as drugs, money laundering, extortion and violence. The NCA has advised that currently there are about 2000 task force members and that a form of register is kept by the NCA.

5.16 No formal arrangements have been made with these agencies about investigating complaints against their seconded officers. It has been the NCA's practice to request the home forces of police against whom complaints have been made to conduct joint investigations.

5.17 Task force members may remain under the control and direction of their home agency and may not be subject to the day to day control of the NCA. Some task forces may last for long periods of time, for example, for three years. Some members of a task force may have only intermittent roles (for example, passing on information) and no routine contact with the operation. For some individual operations there may

be federal, State or Territory police or other professionals who are involved but who are not officially members of the task force.

### ***Profile of NCA staff***

5.18 NCA staff are currently in categories a), b), c) and e) as described above. As at 31 July 1995 there were 404 staff members of whom 113 were police with 50 of those being AFP members.<sup>161</sup>

### **The current complaints process**

5.19 Since the establishment of the NCA in 1984 none of its mixed workforce has been subject to a formal NCA complaints system. There is no provision in the NCA Act for a process of making and investigating complaints against the NCA or members of its staff.

5.20 The current administrative procedure is that all complaints are forwarded to the Chairperson who then directs officers to undertake inquiries on his or her behalf. There is a separate Complaints Register maintained by the Policy Section. There are no specific case management guidelines for the investigation of complaints. The Chairperson determines who is the most appropriate officer to investigate each complaint.

5.21 The NCA does not presently keep statistics on the time taken to deal with complaints. Progress is monitored by the Policy Section through the Register and by the Chairperson who oversees all complaints. Most complaints are dealt with within a period of four weeks or less, but any average time to complete matters is distorted by the small number of very complex matters which take much longer to resolve.

5.22 Where allegations against the NCA or its staff have been deemed to be serious enough to warrant it, either the NCA or the Minister has appointed an independent inquirer to investigate them.

5.23 Current accountability for the general activities of the NCA resides in two bodies: the Inter-Governmental Committee (IGC) and the Parliamentary Joint Committee on the NCA (PJC).

5.24 The IGC is established under the NCA Act and consists of Commonwealth, State and Territory Ministers responsible for administering the NCA Act in their jurisdictions. It is chaired by the Commonwealth Minister.

5.25 The PJC is made up of five Members of the House of Representatives and five Senators. It monitors and reviews the performance by the NCA of its functions and reports to both Houses of Parliament.

5.26 The IGC and the PJC do not have any specific responsibility or ongoing role in the investigation or resolution of individual complaints against the NCA. As discussed in paragraph 5.157 it is generally agreed that neither body would be appropriate or has the structure and resources to perform that role.

### ***Numbers of complaints***

5.27 The NCA received 16 complaints for 1995-96,<sup>162</sup> 17 complaints in 1994-95, 18 the year before and 15 in 1992-93. Some were not investigated because there were no objective facts or circumstances in support of them, a few related to recruitment matters, others related to the alleged unauthorised use or release of information or to allegations that investigations or investigative techniques were illegal or improper.

5.28 Each category of the NCA's mixed workforce is defined under the Act to mean a member of staff<sup>163</sup> primarily to ensure that the secrecy provisions for the unauthorised disclosure of information apply in every case.<sup>164</sup>

### **Major defects of the current NCA complaints process**

5.29 In the DRP the Commission considered that the current ad hoc arrangement for dealing with complaints is deficient in that it lacks any formal process and any consistent external scrutiny. The system does little to create public confidence in the accountability or integrity of the NCA. 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.

5.30 In its 1991 report *Who is to Guard the Guards. An evaluation of the National Crime Authority* the Parliamentary Joint Committee on the NCA (PJC) considered that the complaints system needed to be improved and canvassed options such as the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security or a new agency.<sup>165</sup> The then Chairperson of the NCA, Justice Phillips, told the PJC that he favoured a system of inquiry outside the NCA for handling serious complaints.<sup>166</sup> A further report by the PJC in October 1994 again drew the Parliament's attention to the lack of a fully adequate avenue available for investigations of complaints brought against the NCA.<sup>167</sup> It commented that the continuing lack of a complaints mechanism was unacceptable. The PJC itself had received complaints from individuals about the NCA but the PJC commented that it lacked the time and the resources to investigate the more complex complaints. It concluded that the lack of a formal system was unsatisfactory for both complainants and the NCA.

### ***The NCA's submission: no evidence of current system's actual failure***

5.31 The NCA stressed that currently there is no 'complaints system' and that is the problem.<sup>168</sup> It did not regard its current complaints handling process as entirely satisfactory but it argued that it is much better than many other Commonwealth agencies where there is no requirement to bring complaints about the organisation to the agency head.

5.32 The NCA also submitted that the Commission has not provided any evidence that the current system has actually failed to address complaints properly or failed complainants. The submission argued that the current system has some inadequacies but mainly in the lack of perception of external review. Those inadequacies are the result of a legislative failure and not the responsibility of the NCA.

### ***Commission's views***

5.33 The Commission regards the lack of any formal external review as a deficiency. This lack of external review is contrary to accepted practice not only for law enforcement agencies in Australia but also for the public sector generally and increasingly for the private sector.<sup>169</sup> In the Commission's view the lack of external review taints the current process.

5.34 The major weakness in the current system is that there is no effective external agency with the powers, resources, expertise and mandate to investigate complaints and the way in which the NCA actually conducts its operations. The PJC and the IGC essentially provide an element of policy scrutiny. Those committees are not resourced, nor were they established, to deal with individual complaints and allegations of criminality or alleged abuses of the NCA's powers. There is a lack of an external investigatory and auditing body.

5.35 The Commission also believes that the NCA complaints process would benefit from having case management guidelines and standards for investigating complaints including time limits.

5.36 However, the Commission considers that there are a number of case studies and submissions that demonstrate the 'actual' failure of the current system and highlight the great value that the NIIC would provide in dealing quickly, effectively and efficiently with complaints and corruption allegations made against the NCA.

5.37 The Commission offers no comment on the merit or substance of any of the complaints discussed in these case studies nor on the conduct or the outcomes of any of the legal proceedings mentioned. Nor should any inference about the merits of any case be drawn from the fact that the Commission has referred to it. The Commission is using the cases to demonstrate the potentially crucial role of the NIIC. The Commission has therefore necessarily hypothesised about what would have happened if the NIIC had been established. The Commission considers that these hypotheses are reasonable given the proposed role and functions of the NIIC and the issues raised by these cases. They illustrate the potential value of a NIIC to deal effectively and quickly with complaints - a response that the PJC is unable to provide and which in the Commission's view requires a body of the structure, powers and role of the NIIC.

5.38 The case studies and the submissions also show the variety of matters that can arise in relation to the NCA, their potential high profile and media involvement and the costs and inadequacies of a system that does not have an external body with sufficient powers, mandate, expertise and resources to investigate them properly.

### ***Mr M Skrijel***

5.39 In 1978 Mr M Skrijel, a South Australian fisherman, reported to the South Australian police concerns about what he alleged to be illegal drug dealings. He then claimed that the South Australian police had failed to investigate properly his allegations and that he was being victimised within his local community. Mr Skrijel made his allegations to the Costigan Royal Commission which referred them to the NCA in 1984.

5.40 In 1985 Mr Skrijel asserted that the NCA had also failed to investigate these matters properly and shortly afterwards the NCA officers who had been investigating his claims charged him with trafficking in marijuana and illegally possessing explosives. The original source for their investigation into Mr Skrijel was information allegedly passed to them from a deckhand who had worked with Mr Skrijel. A marijuana plantation was found near Mr Skrijel's property and some evidence apparently consistent with his having involvement with that plantation was also found on his property together with some gelignite.

5.41 Mr Skrijel was convicted and sentenced to two years jail. His conviction was quashed on appeal after he had spent some 5 and half months in jail. Mr Skrijel continued to protest his innocence and claimed that the case against him had been fabricated. In 1993 a South Australian barrister Mr D Quick QC was asked by the then Minister for Justice to report on the case. Mr Quick concluded that there was substantial evidence to base a strong suspicion that the evidence against Mr Skrijel was fabricated. The opportunity to fabricate evidence was available to NCA officers and to members of the Victorian police who were acting with the NCA in the investigation.

5.42 Mr Quick advised that in the cause of both justice and the public interest a Royal Commission should be established to inquire into these matters because they required an inquiry with major detective resources and the power to compel witnesses to give evidence. The then Minister for Justice, the Hon Duncan Kerr MP, referred a number of the allegations to the Victorian Deputy Ombudsman for investigation on the basis that most of the police involved were seconded to the NCA from Victoria. The Victorian Deputy Ombudsman is now investigating these matters referred to him.

5.43 This case continues to attract media attention<sup>170</sup> and the media coverage suggests that it continues to cast some doubt within the community about the integrity of the NCA.

5.44 If the Commission's proposed NIIC had then been operating there would have been no need to engage Mr Quick to conduct an inquiry or then to arrange for the Victorian Deputy Ombudsman to investigate any matters. The NIIC would have investigated from the outset with the full range of powers available to it that Mr Quick did not have.

### ***NCA and James McCartney Anderson***

5.45 In 1990 the Senate resolved that the PJC should consider the relationship between the NCA and Mr Anderson who from 1984-88 provided information to the NCA and was provided with witness protection. The NCA dealings with Mr Anderson primarily concerned the alleged criminal activities of Mr Abraham Gilbert Saffron.

5.46 The PJC appointed a legal adviser, Mr John Basten, to assist in its inquiry. The Committee held hearings on 8 days between August and December 1992. It finally reported in March 1994. The PJC noted in its report that the memories of the relevant events had faded.

5.47 The PJC found that the NCA had not acted in accord with the dictates of sound management and administration. In particular, the NCA had not conducted any formal assessment of whether it should use Anderson as an informer or witness before entering into a relationship with him.

5.48 Under the Commission's recommendations for the NIIC this matter could have been the subject of a formal complaint or the NIIC might have investigated it of its own motion and addressed it generally in its review of the NCA's anti-corruption plans and measures. The NIIC might have addressed the broader issue of the NCA's general policy in relation to informers. If the NIIC was conducting an audit of the NCA's anti-corruption policies the practice in relation to informers might well have been changed or clarified before Mr Anderson was used as an informer or continued to be used as an informer over a period of four years. If an investigation was necessary the NIIC would be able to provide quick and effective investigation by expert officers experienced and trained in law enforcement work and with a specific focus on integrity and probity issues.

5.49 Under the current system the PJC was not given a reference until 1990, some 6 years after Mr Anderson was first used as an informer, and the PJC did not conduct its hearing until 1992. The amount of public funds expended on a PJC hearing of this magnitude would have been considerable if one takes into account, for example, the salary components of the members and administrative costs. The PJC also required the assistance of a legal adviser with the attendant costs that would have involved. It was not able to release its final report until 1994 some 10 years after the beginning of the relevant events.

### ***Mr Constantine Karageorge***

5.50 One submission referred to the activities of the NCA in relation to Mr Constantine Karageorge.<sup>171</sup> It alleged that the NCA had conducted a vendetta against Mr Karageorge. Mr Karageorge complained to the PJC that he had been the subject of detailed investigations by the NCA. He alleged that the NCA was investigating matters pertaining to him that were beyond its terms of reference and its charter. Mr Karageorge is a solicitor who acted for Leonard Arthur McPherson, widely regarded as a major crime figure in Australia. Both were charged with offences relating to defrauding the Commonwealth. Mr Karageorge was also charged with giving false testimony to the NCA. According to the submission, the court hearing these matters held that Mr Karageorge had no case to answer. Subsequently Mr Karageorge has been charged with offences by way of ex officio indictments alleging offences against s 29D of the Commonwealth Crimes Act for attempting to defraud the Commonwealth or alternatively s 29B of that Act and for false testimony against the NCA under s 33(1) of the National Crime Authority Act. Mr Karageorge is to face trial in November 1996.

5.51 According to the submission, Mr Karageorge formally complained to the PJC about the conduct of the NCA and was advised by the PJC that the matters raised by Mr Karageorge were not ones that it could reasonably hope to resolve given the constraints on Committee members' time and Committee resources. In those circumstances the Committee considered it better not to commence an inquiry.

5.52 According to the submission, Mr Karageorge did not request the Chairperson of the NCA to conduct an internal review of matters of complaint as prior to Mr Karageorge's trial such a request was considered to be 'an exercise in futility'. The submission expressed the opinion that it 'was chilling to think that in this so called enlightened society Mr Karageorge has nowhere to turn except to fight his innocence through the courts, irrespective of the stress, cost and time involved'.

5.53 The submission argued that there should be some independent body established that has sufficient resources and expertise to fully examine and, where complaints against the NCA are found to be substantiated, act to protect and afford suitable redress to the complainant. The body should also have sufficient power to examine complaints against the NCA that cross over to other agencies such as the Australian Taxation Office.

### ***Operation Ark***

5.54 The NCA conducted an investigation in South Australia codenamed Operation Ark which arose out of a failure to notify the proper authorities, including the South Australian Commissioner of Police, of the fact that 13 allegations concerning police involvement in or protection of drug trafficking had been received during the 1989 Operation Noah in South Australia.<sup>172</sup> Operation Noah is the annual phone-in operation seeking information about drug trafficking.

5.55 The NCA commenced an inquiry including hearings. A draft report was prepared in July 1990 and was transmitted by the then Chairperson Justice Stewart to the South Australian Government on 30 June 1990. The draft report found no evidence of corruption or dishonesty but recommended a review of the employment suitability of three South Australian police officers. The newly constituted NCA with Mr Farris replacing Justice Stewart advised the South Australian Government that the draft report should not be considered as a report of the Authority and that the draft reports recommendations about the three officers were now rejected. There was a conflict of opinion between Mr Farris and Justice Stewart on the status of the report. Reports and allegations about Operation Ark were canvassed on the ABC's *7.30 report* and then on Channel Nine. The PJC examined the matter and the status of the NCA report and published its report on the matter in October 1990.

5.56 In a qualifying statement to that report four members of the Committee, Senator N Crichton-Browne, Mr P Filing MP, Mr P McGauran MP and Senator A Vanstone stated that they were not satisfied that the Committee was in a position to make final conclusions about the matter without interviewing further witnesses and examining the totality of the evidence obtained. These members concluded that there was an 'apparent failure of the Authority to manage the internal conflict and tension arising from the Operation Ark Report'. According to these members this internal conflict and tension within the NCA and its potential impact on the Authority's capacity to effectively fulfil its duties and functions was relevant to the statutory obligations of the Committee.

5.57 The Commission regards this as another case where the NIIC would have been able to carry out an expeditious and full investigation of the matters raised.

#### ***Mr J Pooley***

5.58 Mr John Pooley, a director of Aymkone Pty Ltd, made a submission which asserted that the NCA had mistreated him and the other directors of his company and had set out to close its business.<sup>173</sup> He stated that the NCA had conducted searches of the directors' homes and the business premises apparently in connection with a drug investigation involving a person who had used the services of Aymkome Pty Ltd to a limited extent. According to Mr Pooley the NCA officers gave no information as to why they were conducting the search. He then claimed that the NCA illegally seized all the bearer stock from the company's safe deposit box. According to Mr Pooley the NCA then instructed the Australian Taxation Office (ATO) to issue the company a Tax Assessment Notice for \$1.6 million which completely stopped the business by breaching the company's assets liabilities ratio stipulated in its licence by the Australian Securities Commission. Mr Pooley stated that the ATO has never justified this assessment and it was withdrawn 12 months later without explanation. According to Mr Pooley the directors of Aymkone were arrested in March 1993 and charged with obtaining a financial benefit by deception.

5.59 A magistrate heard the matters and ruled that the directors had no case to answer and ordered the NCA to pay costs. According to the copy of the transcript supplied by Mr Pooley the Magistrate held that there were two explanations for what he considered to be improper actions by the NCA in relation to Aymkone Pty Ltd. The first was that the NCA officers had been incompetent. He held that a proper investigation of the case should have revealed that there was an elementary defect in the prosecution case. The second possible explanation was that the NCA deliberately set out to destroy the directors' reputations and as a consequence their business. The magistrate chose to believe that it was the former but expressed grave reservations about the conduct of the NCA in the particular matter. The case and the decision of the magistrate received significant media attention.

5.60 According to Mr Pooley the NCA has appealed against the costs decision and the NSW DPP has ex officio indicted two of the directors and charged them with intent to defraud.

5.61 Mr Pooley has submitted that the current methods of making complaints against the NCA are inadequate and that his efforts to complain had been thwarted on each occasion by the response that no body had the resources or the authority to investigate the complaint. Mr Pooley had the view that any new complaints body must be as powerful as the NCA.

### ***Mr Elliot and Elders IXL***

5.62 In 1989 the then Chairperson of the NCA Mr Peter Farris QC approached the then Chairman of the National Companies and Securities Commission, Mr Henry Bosch, with a view to expanding the NCA's investigation into corporate crime. Mr Bosch suggested an investigation into the way in which some directors of Elders IXL had gained effective control of one of Australia's major companies through the takeover of Elders by Harlin Holdings Ltd.

5.63 The NCA then sought and was granted by the Inter-Governmental Committee (IGC) a reference 'on the way in which directors of Elders IXL have gained effective control of one of Australia's largest companies'. No general reference was sought or granted to investigate the affairs of Elders IXL Ltd, its directors or associated companies or persons.

5.64 Mr Elliot, Mr Scanlon and Mr Biggins, directors of Elders IXL, were subsequently charged with conspiring to misappropriate \$66 million dollars from Elders IXL Ltd through two transactions which were represented as legitimate foreign exchange dealings. There were specific charges of theft, conspiracy to defraud and falsification of certain business records.

5.65 A substantial part of the prosecution case rested on statements made by each of the defendants in the course of hearings conducted by the NCA in the purported exercise of its powers conferred by the National Crime Authority Act s 25. Those hearings were conducted in late 1990. The defendants claimed that the NCA acted unlawfully in conducting hearings into the foreign exchange transactions. The defendants claimed at their subsequent trial that the NCA hearing's subject matter was not encompassed by any reference given to the NCA to conduct a 'special investigation' and that accordingly the NCA had no power to require any of the defendants to attend at a hearing, or to compel them to answer questions in relation to it.

5.66 The defendants also argued that they had no means available at the time of knowing that the NCA was acting outside of its powers in conducting that hearing, principally, because the Authority had, in an excess of zeal on the part of those who were actively engaged in the investigation, adopted a deliberate policy of concealing its objectives and the actual subject matter under investigation.

5.67 Justice Vincent held that the evidence obtained from the NCA hearing was inadmissible in the trials of the defendants. The NCA could only use its coercive powers normally unavailable to police services in clearly designated circumstances, in this case, for the performance of the NCA's special functions.

5.68 Justice Vincent did not draw an inference that the Authority and those who represented it had deliberately abused the powers at their disposal. However, his Honour stated that these powers had been employed in a 'regrettably casual fashion with little indication that any significant regard was had to important constraints set out' under the NCA Act.

5.69 Justice Vincent also commented that the real decision making power in the NCA on the basis of the evidence before the Court, as is commonly the case for the NCA, was exercised at lower levels within the NCA and subject to limited forms of accountability and monitoring.

5.70 His Honour also commented that the NCA apparently chose to use its coercive powers wherever possible, disregarding alternative methods of enquiry or for securing evidence, for example, search warrants. The documentary evidence from the NCA was 'notably and sadly deficient of any suggestion of awareness on the part of those involved in the investigation of the exceptional nature of those coercive powers'.

5.71 Justice Vincent held that for the hearing to have been conducted for the purpose of a special investigation those who proposed it should have addressed the question of its purpose in relation to the special investigation. It was at least necessary, before they used coercive powers to be satisfied on reasonable grounds that there was reason to suspect that the subject matter of the hearing bore upon the subject matter of the special investigation. Justice Vincent decided that there was no evidence that any serious attention had been given to the parameters of the References to the Authority nor to the perception of the existence between the foreign exchange transactions and the matter referred for investigation. His Honour's opinion was that this issue of a necessary connection did not intrude until the NCA received a letter dated 18 June 1992 from a firm of solicitors acting on behalf of one of the defendants.

**5.72 *Role of the NIIC.*** In the Commission's view the history and course of the Elders IX investigations and prosecutions confirms that the NCA would benefit from having effective and readily available external oversight. If the NIIC had been operating at the outset of the Elders IX investigations, the performance of the NCA and the lawfulness of this operation would have been within the NIIC's purview. The NIIC would have been able to inquire of its own volition into the lawfulness of the NCA's activities in the context of the NCA's terms of reference. There is nothing novel in a complaints body reviewing the lawfulness of an agency's activities. This is precisely what an effective independent complaints authority is supposed to do. By initiating its own investigations or inquiries, or responding to complaints, a law enforcement complaints body must often determine the legality of particular conduct or the policies of the relevant agency. For example, in relation to complaints against law enforcement agencies the external agency may have to decide whether the police used excessive force, whether they acted within the terms of a warrant or whether they allowed unauthorised disclosure of information.

5.73 In the Elders case, the first matter for the NIIC to consider would have been whether the particular investigation was authorised by the terms of reference. To do this the NIIC would have been able to require access to all the NCA documents and information. Under the Commission's recommendations the NIIC would have access to the same amount of information as the Chairperson of the NCA. Justice Vincent indicated that the failure of NCA accountability in relation to this matter occurred at a lower level. Direct and close oversight was necessary to discover and remedy any deficit in authority for the investigation.

5.74 If the NIIC had made a report on the Elders investigation to the effect that the NCA was acting illegally or even questionably, then it would have reported this to the relevant bodies, that is the NCA, the PJC and the Attorney-General. One would expect that the NCA would have then considered the report and altered its position. It might have then obtained independent legal advice. If the NCA had continued on the course of action then the NIIC, if it had exhausted its capacity to affect the action by advice, could have considered the bringing of legal action itself to restrain the NCA. The other alternatives in the face of a continuing deadlock might have been that the NCA challenged through legal action the investigation and report of the NIIC, or the parties, such as Mr Elliot, used the report of the NIIC as a basis for seeking restraining action themselves.

5.75 In the Commission's view the NIIC would have intervened well before the case got to the DPP. However, if the matter continued and the DPP was briefed to prosecute the DPP would, in exercising his discretion as to whether to prosecute, have had to consider the evidence available and the manner in which it was obtained. He would have assessed the legality of this evidence and whether it would be admissible. In the Commission's view the investigation and report of the NIIC would have brought this issue into focus at a much earlier time than actually occurred, with a consequent saving of considerable resources and in all likelihood reducing the level of the subsequent criticisms of the NCA's credibility, competence and integrity. The Commission notes that aspects of the decision of Justice Vincent are subject to appeal to the Victorian Court of Appeal. The verdict is not. The Commission would need to consider the Court of Appeal's decision in order to assess whether it affects the arguments presented in this report.

### ***Value of the NIIC***

5.76 It was suggested at the Commission's hearing before the PJC that the existence of the NIIC may not have had an appreciable impact on complaints and allegations because the outcome of complaints and investigations is ultimately a matter for the Executive or the courts.

5.77 Certainly the Executive, the Parliament and the courts play a crucial role in ultimately determining the outcomes of such matters. However, the NIIC would provide the clearest, earliest and most direct oversight of NCA operations. In its advice to the Commission the PJC noted that 'it has experienced considerable difficulty over the years in providing effective and meaningful oversight of the NCA'. In the Commission's view the NIIC would remedy those difficulties.

5.78 It would provide the PJC and the Executive with the opportunity for an in-depth and independent assessment of a complaint or allegation. In the Commission's view it would be an exceptional course for the Executive to ignore the NIIC's investigations and conclusions. The Government would have to justify its response to a NIIC report both publicly and in the Parliament. The NIIC's report would have the status of a report from an independent body specifically tasked and resourced to provide such reports. The Commission

suggests that the experience of the CJC and the NSW ICAC shows that such investigative bodies are able to act independently of the Executive and that their reports are generally accepted and acted upon. In the Commission's view there is no better method available to ensure that Executive Governments do respond adequately to complaints about law enforcement agencies. Both the Government and the Parliament would be able to review any NIIC report and require the NIIC Chairperson to explain the course of conduct and its recommendations.

5.79 The NIIC would provide the best guarantee to the Government, to the Parliament, to the individual complainant and to the public that a complaint has been investigated properly and impartially. This would place the PJC in a much stronger position to say with confidence to a complainant and to the public that a particular complaint had been properly dealt with and the appropriate outcome reached. Some complainants might still be dissatisfied but the integrity of the oversight system would be vindicated. The NIIC in its investigations of particular matters and in its annual reporting role on the NCA would also assist the PJC to make very informed comments and reports on the overall performance of the NCA. The PJC would have the right upon the tabling of a NIIC report to examine matters arising out of those reports including questioning the NIIC Chairperson. The NIIC would have a regular pattern of consultation and briefing with the PJC and its investigating standards, modus operandi and personnel would be available to the PJC for examination and scrutiny.

5.80 In the Commission's view it is incorrect to see the NIIC as providing review and remedies that are already provided by the courts. The courts currently provide review of some of the operations of the NCA. However judicial review is a very limited remedy for the majority of citizens. It is a costly and lengthy process. Few people have the resources to initiate and continue applications for judicial review. Mr Skrijel has commented that he does not have the resources of a Mr Elliot to take court action against the NCA.

5.81 There are other limitations to court review. It is by its nature usually reactive. It cannot provide the auditing and preventive capacities that the NIIC would provide. A judicial decision focuses on the remedy and a legal determination of the particular case. It does not overview the policy and practices involved.

5.82 The NIIC is likely to reduce the number of judicial challenges to NCA activities. Some parties who might have otherwise taken court action will go to the NIIC because it will offer a cheaper, quicker alternative. This will not only be of value to the complainant but also to the public because in the usual course of events an investigation by the NIIC should be less expensive in terms of public revenue than a court process.

5.83 The NIIC would not be the final court of appeal in the court hierarchy. The courts in consideration of a matter where the NIIC had conducted an investigation and made a report would use their normal rules of evidence as to admissibility and as to the weight to be given to such evidence. The Commission envisages that in many of those cases the NIIC investigation and report would be of considerable use to the Court in an action for judicial review.

5.84 If the NIIC were to determine that a complaint against the NCA was not substantiated, the complainant might leave the matter at that. Alternatively, the complainant might seek to make a complaint about the NIIC's handling of the matter or might seek judicial review of the NIIC's determination. If the complainants were charged with criminal offences, the report of the NIIC would be subject to the normal rules of evidence for the particular criminal proceeding. The NIIC would not be a party to the matter and it would not be conducting the prosecution or instructing in that case.

### ***Limited role of the DPP***

5.85 It might be suggested that the DPP could provide the necessary independent external scrutiny to ensure the legality and probity of the NCA's activities. The Commission considers that the DPP could not provide the full range of external investigation and review that is necessary. The DPP is a specialist prosecutor. He is not an investigator. He does not audit other agencies. The DPP may not have any input into a particular investigation at all or not until given a brief of evidence. He does not have royal commission powers. Moreover from the public perspective, the DPP is likely to be linked quite closely to the agencies upon whose behalf he acts. It would be difficult for the DPP to be regarded as at arms length from agencies such

as the NCA with whom the DPP has a continuing and necessary relationship in the prosecution of criminal matters.

### ***Relationship with the IGC***

5.86 The NIIC would not and could not usurp the role of the IGC. It would not play a role in the formulation of a particular reference for the NCA. It would not have any jurisdiction to review the actions or decisions of the IGC or the PJC. The only role that it could play in the activity of the IGC would be at the IGC's invitation. Its jurisdiction would be limited to the activities of the NCA.

### ***Concerns of the Council for Civil Liberties***

5.87 The Council for Civil Liberties has submitted that the Federal Court forum is a 'totally inadequate means' for addressing complaints issues because of the legalism and formalism of such proceedings and the costs involved. In practice, Federal Court review does not offer any protection to the average litigant against NCA excesses.

5.88 The Council for Civil Liberties submitted that the NCA excessively relied upon secrecy provisions, especially at committal proceedings in response to defence questions. It commented that the NCA appeared to take a different stance on this issue in different States. The submission argued that a federal oversight body was necessary, among other things, to monitor the NCA's operations for consistency. Another concern raised was that the NCA was now using its extraordinary compulsory powers, such as the investigative hearing, as the norm. It was originally envisaged that such powers would be used only in exceptional circumstances. The Council commented that an effective federal oversight body could monitor the use of these extraordinary powers.

## **A formal complaints system including external review necessary**

5.89 The DRP proposed that there must be a formal complaints system for the NCA that includes effective external review. Such a system is necessary to ensure public confidence and accountability. This view has been endorsed during the Commission's consultations and in submissions received and is strongly supported by the case studies discussed above. The NCA in its submission argued that it has consistently advocated the investigation of complaints by an external body but is not convinced that a new body is necessary.<sup>174</sup>

### **Recommendation 7 - A complaints system for the NCA**

The NCA should have a formal complaints system established under legislation that provides effective external participation and scrutiny.

### ***A unified NCA complaints process***

5.90 The DRP proposed that there should be a unified NCA complaints process that applied to all categories of the NCA workforce, that is to the Chairperson, members and all staff members. The reasons put forward to support that proposal were as follows.

5.91 Under the current fragmented approach complainants may well be confused about to whom they should complain and may feel that the NCA is 'passing the buck' if the NCA refers matters to the home agency. There is also potential duplication of investigation by federal and State or Territory bodies. For example, one complaint may concern officers from a large number of agencies scattered across Australia. Under the current approach it is possible that for such a complaint each agency will conduct its own separate investigation including interviewing the same witnesses and gathering the same evidence with attendant extensive travel and accommodation costs.

5.92 This single system would provide the clearest line of procedure, accountability and consistency. Seconded police, consultants, legal practitioners and task force members would only be subject to the NCA complaints procedure in relation to their work for the NCA. Thus for example Task Force members from a State or Territory agency would only be subject to the NCA complaints procedure in their capacity as a

member of that Task Force. The legislation could specify the range of conduct covered by providing that the action that may be subject to the operation of the NCA complaints provisions is action in performance or purported performance of the person's powers or functions under the NCA Act or action arising directly or indirectly in the course of the person's employment or engagement under the NCA Act. 'Employment or engagement' would be defined to cover all possible categories of staff. 'Action' would include a refusal or failure to act. The relevant State and Territory home agencies could introduce complementary legislation to make it clear that their officers who are staff members of the NCA by virtue of the NCA Act are, while performing their NCA functions, covered by the NCA complaints legislation.<sup>175</sup>

**5.93 Implementation process.** If a uniform system was implemented all personnel including seconded staff, consultants, legal counsel and task force members should be advised as soon as practicable that they are subject to the NCA complaints system. This should be done where possible before people become staff under the NCA Act. Their obligations should be made clear to them before they join. Where there is a contract of engagement, it should be a term of the contract that the person acknowledges that he or she is subject to the NCA complaints procedure. In other cases this could be readily achieved by a simple information sheet designed for each category of staff.

**5.94 Submissions and consultations.** The NCA and the Attorney-General's Department supported this proposal.<sup>176</sup> The NCA suggested that the indications were that the State and Territory police forces who second their members to the NCA would also accept the proposal.<sup>177</sup> The Attorney-General's Department noted that although the NCA should be accountable for dealing with complaints against it, the home jurisdictions of seconded officers and task force members should also have a role in complaints investigations and disciplinary action in respect of their officers. A unified system might be able to work on the basis of agreements or consistent State and Territory legislation. The options would need to be explored.

**5.95** The Western Australian Police Service submitted that the home police service should maintain jurisdictional control in all cases of

- misconduct and offences committed off duty and
- misconduct and minor offences confined to summary jurisdiction committed while on duty and acting alone.<sup>178</sup>

**5.96** The WA Police stated that all instances of more serious infringements against the criminal law should be in the jurisdiction of the NCA complaints investigation system. This would be essential to maintain the integrity and the continuity of the investigation and ensure consistency in any sanctions applied. The WA Police did not comment directly on whether the NCA should also be able to discipline seconded officers but did comment that the State Police services must always retain the option of withdrawing the services of any seconded officer whose conduct or performance they considered inappropriate.

**5.97** The South Australian Police and the Victoria Police supported the establishment of an NCA complaints system and an NCA disciplinary process.<sup>179</sup> The Victoria Police agreed with the concerns expressed in the DRP that there is needless duplication of effort, waste of resources and apparent confusion under the present system. It argued that persons seconded to the NCA should be held accountable to the disciplinary code operating within the NCA during their period of secondment. However, where the nature of the complaint is such that if true, it may warrant dismissal, demotion or reduction in remuneration, the responsibility must lie with the home agency. Details regarding breaches of discipline dealt with by the NCA should be the subject of report to the members' home agency and form part of the members record of service.

**5.98** The Queensland Police Service supported the establishment of an NCA complaints investigation system but was opposed to an NCA disciplinary code that applied to seconded State police officers.<sup>180</sup>

### ***Commission's views***

**5.99** There appears to be clear recognition of the desirability of the NCA having its own complaints investigation system. The State police forces on the whole appear to support this proposal. However, the issue of whether the NCA should have its own disciplinary code that would apply to seconded officers is

more problematic and requires further discussion. The Commission confirms these recommendations and considers that the response to them thus far indicates that they are feasible but should be the subject of further consultation.

### **Recommendation 8**

There should be one uniform NCA complaints system applying to NCA members and all its staff that is, to (a) members and the Chairperson (b) staff employed under the Public Service Act, (b) seconded staff (c) consultants (d) legal practitioners and (e) members of task forces.

## **Which body should provide external scrutiny?**

### ***The DRP's proposal - the NIIC***

5.100 The DRP identified three major choices - the National Integrity and Investigations Commission (NIIC), the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security. It proposed that the NIIC should provide external scrutiny and participation in the system of complaints against the NCA and its staff.

5.101 The current role of the Ombudsman in complaints against the AFP is discussed in chapter 3. Under the *Inspector-General of Intelligence and Security Act 1986* (Cth) the Inspector-General investigates complaints against Australia's five intelligence and security agencies with broadly similar powers of investigation and recommendation as the Commonwealth Ombudsman.

5.102 The DRP stated that neither the Ombudsman nor the Inspector-General is the most appropriate agency to deal with complaints against the NCA. The Commission preferred that its proposed National Integrity and Investigations Commission (NIIC) should have the responsibility to deal with complaints against the AFP and the NCA. The general reasons for this preference are discussed in chapter 9. The broad issues raised and the objectives for the AFP complaints system and the NCA complaints system are essentially the same. The AFP and the NCA are different in composition, focus and powers but there are broad similarities. Both are national law enforcement agencies with a primary function being an investigation of organised crime. However there are also specific reasons why the NIIC should be the external agency to investigate and review complaints against the NCA.

5.103 The NCA is a body with significant coercive powers and a broad charter of responsibility. Any agency that provides for external review of complaints against it must have the status, investigative powers and capacity to be able to provide effective review. Community confidence is most likely to be increased by the introduction of a specialist and focussed external agency that can provide searching and thorough scrutiny. The Commission considers that of all the options canvassed it is the NIIC that is most likely to have those characteristics. Moreover, if it is accepted that the AFP requires the introduction of the NIIC there will be efficiencies and cost effectiveness factors that support the NIIC also providing external review of the NCA.

5.104 If the Ombudsman's Office was given the investigative role for the NCA, it may experience difficulties in devoting sufficient resources to complaints against the NCA. The Ombudsman's record in relation to the AFP suggests that this would be a significant concern. Moreover, as explained in chapter 8 the Commission considers that the Ombudsman's Office with its traditional role of reviewing defective administration is not the most appropriate agency to be investigating complaints against the NCA where some complaints may concern actions taken by police officers or the improper use of coercive powers.

5.105 In this context the Inspector-General's Office also has limitations. It is a small agency with few resources for the conduct of intensive investigations. It would require additional resources to undertake supervision of complaints against the NCA. Moreover, its current role has been limited to complaints against the intelligence organisations. While it is true that the NCA has an intelligence gathering role it also has similarities with the role of the AFP. The NCA is not a specialist intelligence agency in the nature of ASIO or ASIS. It is primarily concerned with organised crime and law enforcement and, for example, has personnel who are police or others who are experienced and trained in aspects of law enforcement, not

espionage or national security. It could be broadly said that the NCA is an organisation falling somewhere between an intelligence agency and a police service.

5.106 The Commission considers that the NIIC would be able to build quickly a high profile in the community for independent monitoring and review of federal law enforcement activity. In contrast the Inspector-General of Intelligence and Security may be less widely known and is more likely to be regarded as specialising in security and espionage and not in investigating a wider range of complaints. The NIIC with its separate divisions relating to complaints and corruption would be able to offer greater accessibility to the general community for the full range of complaints than the Inspector-General.

5.107 The Commission also considers that the NIIC with its specific focus on complaints and corruption in relation to law enforcement and with its public status as a standing royal commission is less likely than either the Ombudsman or the Inspector-General to have difficulties in handling attempts at abuse of its process. It may also be better placed than the Ombudsman or the Inspector-General to respond to any attempt by organised crime to use threats, intimidation or inducements for corruption.

### ***Submissions and consultations***

5.108 The Australian Council for Civil Liberties submitted that the Inspector-General of Intelligence and Security was inappropriate for handling NCA complaints because that Office was steeped in a tradition of dealing with the clandestine culture of ASIO, ASIS and other intelligence agencies.<sup>181</sup> The Council concluded that the Inspector-General's office is unsuitable by its background, experience and resources base<sup>182</sup> to review the NCA complaints system. It was the view of the Council for Civil Liberties that the NCA is often involved in a 'hands on way' in investigations and that it is not removed from policing 'on the ground floor'. It should not be regarded simply as 'an intelligence gathering body'.<sup>183</sup>

5.109 The Law Council submitted that the Ombudsman would provide ineffective oversight, particularly in relation to the NCA, as the NCA is likely to regard itself as superior in status to the Ombudsman.<sup>184</sup> On occasions the NCA Chairperson is a Judge which makes it more difficult for the NCA to be oversights by an office where there is no head who exercises similar powers and functions.

5.110 ***Comments by NCA officers.*** A common response was that the NCA had limited resources and that care had to be taken to ensure that these limited resources were not too tied up in investigating complaints.<sup>185</sup> Another concern was that sophisticated criminals make use of the complaints process to thwart investigations into them.<sup>186</sup> Some officers supported an internal review with the current arrangement formalised in legislation. Others supported internal review with external oversight from a body such as the Ombudsman.<sup>187</sup> A few argued that serious allegations should be investigated wholly externally.<sup>188</sup>

5.111 Some staff saw little benefit in an external body such as the CJC or an ICAC with coercive powers. It would establish another bureaucracy and there would always be the question of who oversights this external body.<sup>189</sup> Another concern was the prospect of double jeopardy. For example, if there was a single NCA disciplinary code, provision would have to be made to ensure that secondees or lawyers and accountants did not run the risk of being penalised twice, that is, by the NCA and by their home agency or by their professional body.<sup>190</sup> Another view doubted whether one body could review and investigate the work of police, accountants, intelligence analysts and lawyers and understand the different technical aspects and complexities.<sup>191</sup>

5.112 ***Views of the PJC.*** Members of the Commission appeared before the PJC on the 16 September 1996 to discuss the Commission's DRP and in particular the proposals relating to the NCA. The PJC subsequently advised the Commission that it 'remains unconvinced of the need for the NIIC, particularly its proposed role in relation to the NCA'.<sup>192</sup> The PJC did not elaborate on the reasons for that view. However, the Commission assumes that, in dealing with the arguments put forward at the hearing before the PJC and in the submission of the NCA, it will be addressing most of the concerns of the PJC.

5.113 ***Submission from the Inspector-General of Intelligence and Security.*** The Inspector-General of Intelligence and Security in his submission considered the options for external review of complaints against the NCA. He argued that the crucial question was what kind of external review mechanism should exist to provide independent and fearless investigation of public complaints against the AFP and the NCA.<sup>193</sup> His

preference was for a separate body created specially for this purpose. He did not advocate his own office or that of the Ombudsman for this role.

5.114 The Inspector-General compared the suitability of the Ombudsman with that of his office. He acknowledged that the Ombudsman is a more 'public office' than the Inspector-General and might therefore invite greater accessibility for a complaints agency. He thought that a community focussed external review body such as the Ombudsman could oversight the internal handling of customer service and less serious complaints relating to the NCA. However he argued that his office was better placed than the Ombudsman to investigate complaints against the NCA. The qualities sought in his office are in some respects similar to those needed to investigate complaints against the NCA - independence, analytical capacity, ability to work closely with Ministers and agency heads and an understanding of the special needs associated with the handling of highly sensitive material. According to the Inspector-General these similarities are what probably encouraged the earlier idea of the Inspector-General holding a dual appointment as an external complaints body in relation to the NCA.

5.115 However, the Inspector-General argued that there are important differences between the law enforcement area and the security and intelligence field. The former requires a close knowledge of police culture and the police's unique practices, modus operandi and sound background in criminal investigation and law. The sources of information and their handling in this area create particular challenges and require a special expertise, involving a deep understanding of the nature of criminality in our society. His view was that his Office does not require this type of background, nor have any incumbents to date been legally qualified. The nature of the inquiries undertaken would have different features to those presently undertaken by his office and the skills required of the investigative staff would not necessarily be common to both areas. He added that there was little scope for significant resource savings to be made by combining this function with that of his office.

5.116 In the Commission's view the submission of the Inspector-General should carry considerable weight in the determination of these matters. The submission clearly points to the unsuitability of either the Inspector-General or the Ombudsman for the task of investigating complaints against the NCA.

## **The NCA's views**

5.117 The Commission considers it important to canvass the NCA's submission in some detail so that the competing arguments are open to discussion.

### ***Opposed to new agency***

5.118 The NCA considered that it would be a more efficient use of resources to incorporate the investigation of complaints against the NCA within the work of another agency. Mr Broome, the Chairperson, commented that from the perspective of the NCA the establishment of the NIIC has 'all the appearance of a sledgehammer cracking a nut'.<sup>194</sup> The NCA expressed no preference as to the identity of the complaints body but the body should have powers similar to the Ombudsman or the proposed Inspector-General of the NCA. In support of this preference for an existing agency it made the following points.

### ***Small number of complaints***

5.119 The NCA is a relatively small agency with few complaints against it annually (about 18 or less recently).

### ***Commission confusing issues***

5.120 The NCA suggested that the Commission considered issues that it should have avoided. One is the idea of a 'federal ICAC'. The NCA has suggested that the DRP has become a vehicle to argue for a national corruption body, a 'federal ICAC' which requires separate consideration and analysis but it is not a necessary or logical response to the need for an adequate external body to handle complaints against the NCA.

5.121 The NCA also suggested that the Commission had gone beyond its scope of inquiry by untidily mixing complaints handling and disciplinary action. The real issue is the NCA's complaints process.

5.122 The final misconception according to the NCA is that the Commission has tended to 'run together' the AFP and the NCA on the basis that the AFP and the NCA have similar roles, functions and objectives. According to the NCA this is erroneous. The AFP has a particular role in Commonwealth law enforcement and the major proportion of its resources is devoted to policing in the ACT. In contrast the NCA is not a police service. It is a small organisation with limited resources and special powers. To be effective it relies on co-operation with police services. The two organisations are dissimilar in significant ways.

### ***Lack of independence of the NIIC***

5.123 The NCA submission suggested that the proposals of the Commission would mean that the AFP and the NCA would actually provide a substantial part of the investigative capacity of the NIIC. This would be detrimental to an effective and independent external review.

### ***Competing demands***

5.124 The NCA advised that its finite resources are allocated to defined tasks and investigations as part of the annual planning process. Such resources could not be readily reallocated at the request of the NIIC and it raised the question of how conflicting priorities would be resolved.

### ***Location and size***

5.125 The NCA commented that a small Canberra based organisation such as the NIIC that is reliant on the goodwill and investigative resources of the NCA, the AFP and other police services would have difficulty in dealing with these organisations rigorously and at arms length.

## **The Commission's response**

5.126 The Commission has the following responses to the NCA's points.

### ***No new agency***

5.127 The Commission considers that the use of the metaphor using 'a sledgehammer to crack a nut' is inappropriate in considering whether the NIIC should be the external body for investigating complaints against the NCA. The metaphor suggests that the NIIC is too elaborate, too involved and too costly for the magnitude of the problem. In the Commission's view this does not take into proper account the significance of the objectives of a functioning complaints system and under-estimates the inadequacies of the current system. The system recommended by the Commission addresses these factors and in the Commission's view would be more effective in doing so than the only two alternatives that have been suggested.

### ***Small number of complaints***

5.128 The NCA has recorded over the last few years on average about 18 complaints. However, this apparent small number needs to be placed in context.

5.129 The first point is that the Commission is not recommending a new agency simply to deal with the NCA's complaints. The NIIC would also be dealing with the 900 complaints that currently arise in relation to the AFP. There are undoubted efficiencies in having the one body deal with both AFP and NCA complaints. The NCA submission does not address the question of whether it considers that the NIIC is inappropriate for the AFP as well.

5.130 The evidence suggests that complaints about law enforcement agencies which have no or no satisfactory alternative avenues for lodging or investigating complaints will tend to under-represent the true number of complaints. Many people are deterred from making complaints because they feel that it is pointless or they fear victimisation or hostility. The NCA has no external complaints avenue. Currently, it is a completely internal system. The NCA is a body with extraordinary powers, in some respects far greater

than those of police services. Moreover, it also has the reputation, whether it is fair or otherwise, of being a secretive and closed organisation. The Commission considers that it is reasonable to assume that some potential complainants would have been deterred by these matters.

5.131 There is no NCA officer who has any statutory obligation to accept or record complaints. This lack of obligation and process to accept and record complaints is compounded by the fact that the NCA's operations are as geographically diverse as its workforce. It works in close co-operation with many federal, State and Territory organisations. For a potential complainant it may be extremely difficult to determine to whom to complain.

5.132 It is also necessary to consider the significance of the complaints made against the NCA. This is not just a question of quantity but also quality. As discussed in detail above the NCA has been the subject of very serious complaints that go to the way it conducts operations and to the lawfulness of some major investigations.

### ***Location and size***

5.133 The NCA argued that the NIIC would be limited in its role because it would be a small agency located in Canberra. The Commission recommends that the NIIC be located in the ACT. That is the most appropriate location in terms of the AFP because the bulk of complaints against the AFP arise in the ACT. However, the Commission also considers that it is the most appropriate location for dealing with complaints against the NCA. A sizeable portion of the NCA's work involves NSW and Victoria and more specifically Sydney and Melbourne. Canberra is located approximately equidistant between them and within reasonable driving distance of both. There are also regular flight services. Canberra is where Parliament and the Attorney-General's Department are located, so it is convenient for the NIIC in terms of its own accountability requirements.

5.134 It should also be noted that the Commonwealth Ombudsman's AFP investigation role is located in Canberra and that its regional offices refer AFP complaints to it. The Inspector-General of Intelligence and Security is located in Canberra. Neither of the other alternatives to the NIIC offer any advantage in terms of having a greater national coverage.

5.135 As to the NIIC's size as a small agency with about 30 staff, the Commission's view is that figure is appropriate to perform effectively its proposed role. It is necessary to compare the alternatives. The Ombudsman's office currently has seven staff who work on AFP complaints, none of whom is dedicated to the task. The Inspector-General of Intelligence and Security has a very small staff with no dedicated investigative personnel.

### ***Commission confusing issues***

5.136 ***Vehicle for a federal ICAC.*** The NCA has suggested that the Commission should have avoided the issue of whether a federal ICAC was desirable. The Commission has not recommended a federal ICAC. The NIIC's jurisdiction would be limited. Even the possibility of a more extensive jurisdiction to cover other federal law enforcement activities would not constitute what is usually meant by an ICAC because it would not cover the entire public sector. The Commission has explicitly noted that the issue of an extended jurisdiction is outside its terms of reference.

5.137 The possibility of an extended jurisdiction has not influenced the Commission to recommend that the NIIC to investigate complaints against the AFP and the NCA. The Commission considers that the NIIC is the best possible response, including cost effectiveness, for both those agencies irrespective of any potential extension.

5.138 ***Mixing complaints and discipline.*** The NCA has suggested that the Commission should not have considered disciplinary matters. The Commission's terms of reference in relation to the NCA specifically require the Commission to inquire into and report on the NCA 'complaints and disciplinary system in its entirety' and on 'whether the complaints and disciplinary system meets the expectations of the public in terms of accountability, effectiveness and efficiency'. The Commission would have failed to comply with its own terms of reference if it had not dealt with the NCA disciplinary process in its entirety.

5.139 Moreover, the Commission takes the view that if this inquiry tried to restrict itself to the complaints process without considering discipline it would have been fundamentally flawed. An inquiry that does not deal with both and that does not examine their interaction can only present a partial analysis. Complaints are one major source of disciplinary action. Complainants, the public and the agencies themselves do not look at the complaints process in isolation. Disciplinary action or the lack of it is crucial. Complainants, for example, want to know what happened to the officers or staff involved. There is a general public interest in ensuring that the investigation of the complaint led to the appropriate result, that there was fair and effective outcome and that the agencies, where appropriate, made an effective response to any problem.

5.140 *Lack of independence of the NIIC.* The Commission recommends that the NIIC should have overall control and direction of any investigation into complaints or corruption. It should also have overall responsibility and accountability for the effectiveness and propriety of any investigation. While the Commission expects that the NIIC and the AFP and the NCA would have a co-operative relationship there is no doubt that the NIIC would in the event of any dispute have powers of direction.

5.141 For the 'customer service' category of complaints it is clear that the agency itself must take major responsibility for their handling. They are intrinsically managerial matters. As far as the Commission is aware this principle is widely accepted, not only in Australia, but internationally.

5.142 As to NCA involvement in actual investigations of their own complaints and corruption, this is an essential element of the system recommended by the Commission in principle and in practice. However, the parameters of that role would ultimately be determined by the NIIC and subject, where appropriate, to its directions, guidelines and standards.

5.143 It is widely recognised that the agency itself must continue to play a significant role as part of its managerial responsibility. The South Australian Police Complaints Authority commented that police should still investigate the majority of complaints themselves because it forces the police service to consider its policies and lifts its commitment to making changes and improving accountability.<sup>195</sup> The agencies must be engaged and committed to the process so that improvements to policies and practices occur. With a wholly external agency there is a danger that the law enforcement agencies will take little active responsibility for improvements. For example, the submission from the Attorney-General's Department expressed the view that the AFP and the NCA must take management responsibility for investigating complaints other than those of serious criminality or corruption.

5.144 A further advantage of selective input from the agencies is that it is less likely than a wholly external investigation model to interfere with the agency's own operational requirements and lines of communication. It also makes use of the agency's own experience, expertise and in-house knowledge

## **Funding**

### ***DRP's proposals on NCA related funding for the NIIC***

5.145 The DRP proposed that the NCA would contribute some funding to the NIIC, according to the expected proportion of the NIIC's work that is generated in relation to the NCA. The Commission's initial estimate was that this should be in the order of \$150 000 per year. That amount took into account a likely rise in the number of complaints concerning the NCA if the Commission's suggested system were established. It was an amount that represents the amount the Commission believed the NCA in broad terms ought to spend to operate a fully effective complaints system.

5.146 The Commission also considered that the States and the Territories could make some contribution to funding in relation to complaints concerning NCA activities. These contributions would be appropriate given that under the Commission's draft recommendations the NIIC would be conducting or managing investigations concerning State and Territory officers in their NCA related activities and the NCA would have its own disciplinary code that could apply to these officers in the context of their work for the NCA. In that sense the proposed new system would be providing a service for the State and Territory agencies.

5.147 The Commission considered that the amount the State and Territories would contribute would not be excessive. There are a number of possible methods for determining appropriate contributions. The DRP suggested that some major alternatives were as follows.

- Each jurisdiction should contribute the same amount on the basis that each benefits from NCA activities against organised crime in the sense that organised crime is a national problem and that in the longer term each jurisdiction will have cause to be involved in NCA operations.
- Each jurisdiction should contribute on a direct user pays basis. That is, if the NIIC was investigating a complaint in relation to a State or Territory officer, the relevant home agency would pay for that investigation or a proportion of it.
- A formula that differentiates according to the particular jurisdiction's amount of involvement in NCA operations should be introduced. One possibility is that the States and Territories contribute in proportion to their respective populations as at July 1 each year. This is the formula agreed upon in relation to the establishment of the Standing Committee on Organised Crime and Criminal Intelligence (SCOCCI).<sup>196</sup> An alternative formula that might more accurately reflect use of resources would be to base the contribution upon relative police strengths. For example, as at July 1 of each previous year the combined strengths of all police forces excluding the AFP could be determined and each jurisdiction would contribute in proportion to its own police force strength as a fraction of the combined figure.

5.148 The Commission's initial estimate for the combined total of State and Territory contribution was about \$150 000 per annum.

#### ***NCA's submission on funding***

5.149 The NCA commented that the Commission has not offered any evidence to suggest that complaints have not been dealt with properly under the current process that would support the argument that the NCA should be spending a much greater amount<sup>197</sup> It added that while \$150 000 might seem small in comparison with the NCA's overall budget, only a small part of that budget is not already committed to fixed costs. Moreover, the NCA's budget has been reduced by over 20% in real terms since 1994-95. Any further reductions in funds in the order suggested by the Commission would be 'critical' to the NCA's work. Any funding provided by the NCA would not be a redirection of existing expenditure but a new cost. The NCA's submission argued that the Commission had not identified any cost savings.

5.150 The NCA has advised that currently complaints are handled by the NCA at a real but not obvious cost. Demands on the time of the Chairperson and officers handling complaints are absorbed within general administrative costs. If the NIIC is established those costs will still be incurred as it is proposed that the NCA will assist the NIIC in the conduct of its inquiries and handle particular matters. Accordingly \$150 000 or a sum like it is not a reallocation of resources but a new head of expenditure for the NCA. Further a new body might involve a level of formality and bureaucracy which could well cost significantly more.

5.151 In relation to the funding from the States and Territories the NCA was of the opinion that the Commission had no proper basis for the level of funding from those jurisdictions. The arrangements for the secondment to the NCA of officers varies from time to time. For example, at present there are no officers seconded from Tasmania or the Northern Territory. The NCA submission added that this issue of contribution would require negotiation.

#### ***Commission's response***

5.152 The Commission acknowledges that the NCA has incurred budget reductions as have many other federal agencies. Those reductions are political and administrative decisions which are not within the Commission's mandate to comment upon. Nevertheless, the NCA should regard its efforts to ensure integrity and accountability including public confidence in its standards, as a high priority and fundamental to its operations. It must, if necessary, reallocate some of its resources to achieve these goals.

5.153 The NCA has been unable to provide any estimate at all on what it has spent on complaints. All NCA officers involved in complaints undertake work relating to complaints as part of and in conjunction with their other duties. Implied in the NCA's comments is the view that the amount of \$150 000 per year is more than the NCA has actually spent on complaints. It is difficult to comment on what resources, for example, a complaint that say, takes four weeks to resolve might cost, or what the fewer more complex cases might involve. Certainly, however, time spent by the Chairperson on any complaint is resource intensive. The Skrijel case is clearly one that has taken a considerable amount of time and resources. The Quick inquiry into the case, although paid for by the Attorney-General's Department, can be characterised as money that was spent in response to an NCA complaint. The Commission also regards the Elliot case as a matter that might have benefitted by the intervention of the NIIC. The NCA has advised the Commission that it spent in the order of \$9.5 million on the investigation concerning Mr Elliot and others.

5.154 The figure of \$150 000 was included on the basis that it reflected the amount NCA should be spending for having an effective complaints system with appropriate external scrutiny such as the NIIC would provide and which would include auditing of anti-fraud and anti-corruption plans. The Commission continues to regard \$150 000 as a reasonable amount for the benefits that it would provide for the NCA's integrity, accountability and reputation.

5.155 In relation to appropriate contributions by the States and Territories, the Commission suggested a number of options. The NCA submission did not consider them. These are matters that require further consideration and consultation but the problem of ensuring an appropriate and fair contribution from each jurisdiction is not insurmountable. This has been worked out for contributions to NCA operations.

## **Summary of Commission's views**

5.156 The Commission continues to support the NIIC providing external review of the NCA's integrity and accountability. The nature and composition of the NCA and its powers and functions demand effective and focused review from an external agency with suitable powers and capacities. The NIIC would meet those demands. The Ombudsman and the Inspector-General could not. The funding required for the NIIC to carry out this role would not be excessive and there would be clear efficiencies in having the one body review both the AFP and the NCA. Even leaving aside the question of suitability, there would be no significant savings if the Inspector-General or Ombudsman was involved. The Inspector-General has confirmed this in his case and the Commission has commented on why selecting the Ombudsman would provide no significant cost savings in chapter 8.

### **Recommendation 9**

The National Integrity and Investigations Commission should provide external scrutiny of, and participation in, the system of complaints against the NCA and its staff.

## **Should the IGC and the PJC be part of the NCA complaints system?**

5.157 The Commission recommends that these committees should not be part of the NCA complaints system. They could not be regarded as part of the NCA and any review of their actions is essentially a matter for the respective Governments and Parliaments. The NCA submission and the letter of advice from the PJC supported that approach.<sup>198</sup>

### **Recommendation 10**

The IGC and the PJC should not be part of the NCA complaints system.

## **The secrecy provisions**

5.158 The secrecy provisions of the NCA Act makes it an offence to directly or indirectly disclose information relating to the performance of duties. These provisions might be construed to apply to cases

where an NCA officer wishes to make a complaint about the activities of the NCA or a member of its staff. This would seem to be an unwarranted extension of the policy behind the secrecy provision. To prevent complaints by the use of the secrecy provisions might allow wrong-doers to escape investigation and penalty.<sup>199</sup>

5.159 The DRP proposed that an exception should be made to the NCA Act secrecy provisions so that

- it does not apply to a person making a complaint to the NCA or to the NIIC or any person designated to be able to receive complaints about the NCA, and
- the appointed investigator of the complaint has full access to relevant information.

5.160 The NCA accepted this proposal with qualifications. The first qualification was that there should be a provision requiring the NIIC to observe the confidentiality of information received by it. The Commission agrees with this comment and the recommendation for a confidentiality provision for the NIIC is contained in chapter 6.

5.161 The NCA's second qualification was concerned with resolving the situation where the NCA is unable or unwilling to comply with a demand for information by the NIIC. The NCA submitted that there should be a clear legislative response to the requirement to inform the NIIC of information while recognising the restrictions on the dissemination of information concerning, for instance, taxation, telephone interceptions, listening devices, witness protection and secrecy provisions in other relevant legislation.

### *Commission's views*

5.162 The NIIC Chairperson must be in the same position as the AFP Commissioner or the NCA Chairperson in respect of access to information. This is essential if the NIIC is to perform effectively its investigative and auditing roles. The NCA Act, the AFP Act and any other relevant legislation should be amended, if necessary, to ensure that this occurs. This issue of access to information is not an insurmountable problem and it would be raised no matter which agency was selected to provide external review.

### **Recommendation 11**

There should be an exception to the NCA Act secrecy provisions so that

- it does not apply to a person making a complaint to the NCA or to the NIIC or to any person designated to be able to receive complaints about the NCA, and
- the appointed investigator of a complaint has full access to relevant information.

The Chairperson of the NIIC should have access to all information that the AFP and NCA has and may request information from each agency which is to provide it. The NIIC Chairperson should be in the same position as the AFP Commissioner or the NCA Chairperson in respect to access to information in respect to their agencies.

### **A dedicated internal investigations unit?**

5.163 The DRP proposed that the NCA did not need to establish an internal investigations division given the relatively small number and the nature of the complaints that it received.

### *Submissions*

5.164 The NCA agreed with this proposal and suggested that the most effective system would be for the NCA Chairperson to nominate a suitable investigation officer taking into account the nature of the complaint.<sup>200</sup> However, the Victoria Police held the view that a failure to establish an internal investigation unit within the NCA will detract from the overall integrity of the complaints system and is likely to lead to the NCA management losing part of its effectiveness in improving its own culture.<sup>201</sup>

### *Commission's views*

5.165 The Commission agrees with the submission from the Victoria Police and is now of the view that the NCA should establish a suitable permanent structure for dealing with complaints and corruption. The Commission anticipates that with the introduction of the NIIC it is likely that the number of complaints will increase. The Commission considers that the NCA should have a clear focal point for the receipt and evaluation of complaints and for contact with the NIIC.

5.166 There should also be some permanent arrangement for assuming responsibility for the implementation of the NCA's anti-corruption and anti-fraud plans. The NCA in consultation with the NIIC should determine the form of this permanent structure. It might be preferable that it be connected or amalgamated with the NCA's current Security Branch whose main function is to develop, implement and monitor protective security within the NCA so as to ensure the integrity of its staff and assets.

5.167 If it was considered that a special unit to deal with complaints and corruption was necessary to fulfil this permanent role it might consist of about two officers. If the volume of work in relation to complaints and corruption was such that it could not sustain the full time activities of staff, they should be given additional tasks.

### **Recommendation 12**

The NCA should have permanent arrangements in place for the handling of complaints and anti-corruption and anti-fraud plans and measures. The NCA should determine in consultation with the NIIC the best way to implement a permanent structure, including whether there should be a special unit.

## 6. The NIIC's role, structure and powers

### Introduction

6.1 Chapter 4 explained why in the Commission's view the National Integrity and Investigations Commission (NIIC) is the preferred investigative model for the AFP complaints system. Chapter 5 came to the same conclusion in relation to the NCA complaints system. Chapter 8 examines responses to the proposal for the NIIC and chapter 9 expands on the reasons for establishing the NIIC.

6.2 This chapter discusses the NIIC's role, staffing, powers and accountability. It also briefly mentions funding. That issue is dealt with in more detail in chapter 8 because it was central to some of the responses to the DRP.

6.3 The chapter also considers three possible extensions to the NIIC's work and jurisdiction

- the NIIC playing a role in a national approach to investigations for federal, State and Territory agencies, including accreditation for investigators and arrangements for the sharing of information and facilities
- the NIIC having jurisdiction about complaints and corruption in respect of other federal agencies which have law enforcement functions
- the NIIC auditing telecommunication interceptions by the AFP and NCA under the *Telecommunications (Interception) Act 1979* (Cth) — a task which the Ombudsman currently is expected to perform.

6.4 Chapter 7 considers the NIIC's investigative procedures and relationship with the AFP and NCA. That chapter discusses the following four categories of complaints that would be developed:

- Category A — serious criminality, corruption or significant public interest
- Category B — misconduct
- Category C — customer service matters
- Category D — internal management matters.

6.5 For Category A matters the NIIC would take the predominant investigatory role. Any AFP or NCA input would be at the request of the NIIC and be subject to its close and direct control.

6.6 For Category B matters, while the NIIC would still have the capacity for overall control and direction, the input of the AFP and NCA is likely to be greater than for Category A matters and the NIIC is also likely to have less direct management of investigations.

6.7 The AFP and NCA would have primary and direct responsibility for handling Category C and D matters but subject to NIIC guidelines and auditing.

### *Summary of responses to the DRP proposals*

6.8 Overall the response to the proposals in the DRP in relation to the role, structure and powers of the NIIC was supportive. The Attorney-General's Department supported the proposals subject to some modifications which the Commission has adopted. The NCA generally agreed but noted that its comments were made in the context that it was opposed to the establishment of the NIIC in the first place. The AFP also generally agreed with the proposals but suggested that the AFP should exercise control and management of any input that it had in relation to the investigation of complaints that were in the medium range of seriousness. The Ombudsman agreed with the proposed complaints handling functions of the NIIC but did not accept that a

separate body was necessary. She argued that all the complaint handling functions of the NIIC as proposed by the Commission could be undertaken by her office with additional funding and enhanced powers.

## **The NIIC — role, functions and structure**

6.9 A key function of the NIIC would be to investigate serious complaints against the AFP and the NCA and to detect and investigate corruption within those two agencies. It would be able to conduct or order investigations in response to a complaint, report or other form of information or on its own initiative.

6.10 It would receive information about all complaints made against the AFP and the NCA and would then make decisions about the most appropriate means of investigation and the most appropriate persons or agencies to conduct those investigations. It would have wide investigative and review functions in respect of complaints and information about corruption. The NIIC would have the ultimate power in determining who should investigate and would in every case have available to it the power of control and direction of the investigation.

6.11 The NIIC would also produce and analyse data about complaints and corruption and provide reports about trends.

### ***Two divisions: complaints and corruption***

6.12 There would be two main divisions within the NIIC

- the Office of the Commissioner for Complaints and
- the Office for Anti-Corruption.

6.13 This organisational distinction between complaints and corruption is necessary because the two require different approaches.

6.14 The handling of complaints is likely to

- be reactive to individual complainants
- be concerned with day to day policing
- have a significant focus on accessibility and service provision to complainants.

6.15 Anti-corruption is likely to

- be pro-active to be effective
- rely on diverse intelligence information and not merely a formal complaint
- be secretive
- require surveillance and sophisticated methods of investigation, often conducted on a covert basis.

6.16 The two divisions would be physically separated within the NIIC but would share infrastructure and an information system and establish strong liaison. Both divisions would have access to the NIIC database subject to any special security requirements, particularly those relating to the Office for Anti-Corruption.

### ***Legislation***

6.17 The NIIC would be established by its own Act and that Act would provide that the NIIC has its own corporate personality. The Commission considers that the complaints provisions for both the AFP and the NCA should be included in this Act. This would mean that all the main elements of the complaints systems

would be included in the one piece of legislation making it easier for users to locate the relevant law and to understand how the systems work.

### ***Membership***

6.18 The NIIC would have a full-time Chairperson, a full-time Commissioner for Complaints and at least one part-time Commissioner. The legislation should allow the Chairperson to determine the exact number of part-time Commissioners and the duration of their appointments according to the demands of work and the available skills and interests of the Commissioners.

6.19 The Chairperson should be a retired or seconded superior court judge or a person qualified for appointment as a judge who has special relevant experience. The Commission considers that the position of Chairperson requires a person with judicial or extensive legal experience and qualifications because of the coercive powers available to the NIIC and the great responsibility placed on it to be effective and to act according to the law. The Chairperson should be able to delegate to the full-time Commissioner or a part-time Commissioner any of his or her functions or powers.

6.20 The Commissioner for Complaints should desirably be a person with extensive experience in human rights or broad based experience in community affairs such as community legal centres or consumer advocacy. The part-time Commissioner should desirably have extensive experience in police or other investigative work.

6.21 ***Submissions.*** One submission cautioned against having judicial officers performing administrative functions.<sup>202</sup> It could mislead the public about the level of independence of the body. This submission suggested that the Chairperson of the NIIC would not exercise judicial independence because of the reporting requirements to the Attorney-General. The submission argued that any current judicial officer should be required to resign his or her judicial appointment at least during the period of being the Chairperson of the NIIC.

6.22 ***Commission's views.*** The Commission considers that the position of Chairperson should be open to current judicial officers. While being the Chairperson of the NIIC would not be a judicial position, the NIIC would have extensive royal commission powers. Experience in a judicial position is clearly one relevant factor to consider in making such an appointment. The Commission considers that it should be a matter for the Government and the particular appointee to determine whether the appointee should resign from a current appointment.

### ***Location***

6.23 The NIIC would be based in Canberra since the bulk of its work would relate to local AFP community policing. However, the NIIC should have arrangements with the AFP and the NCA to use their regional facilities where appropriate and consideration should be given to establishing arrangements for the use of facilities and resources with other Commonwealth, State and Territory law enforcement and review agencies.

## **Recommendation 13**

The new legislation to establish the NIIC should include complaints provisions for both the AFP and the NCA. The Act should be called the National Integrity and Investigations Commission (Australian Federal Police and National Crime Authority Complaints) Act.

The Act should be drafted so that it is easy for a reader to identify and follow the complaints process.

## **Recommendation 14**

The NIIC should have two main divisions

- the Office of the Commissioner for Complaints and

- the Office for Anti-Corruption.

## Recommendation 15

The NIIC would have a full-time Chairperson, a full-time Commissioner for Complaints and at least one part-time Commissioner.

## Staffing

6.24 The DRP envisaged a staff of about 30 people. That would include a modest Secretariat and a core of people with extensive investigative and legal experience in policing or other investigative work. The Commission estimated that about 15 investigators would be needed. They would have the capacity to conduct their own investigations or manage or supervise other agencies' investigations. All staff would be engaged on fixed term contracts with staggered exits to promote a clear focus on the organisation's key objectives, to avoid 'bureaucratisation' and to foster staff independence from the agencies that are investigated. The NIIC would be able to second personnel and to engage consultants for fixed term appointments. All staff would be subject to initial integrity tests and then subject to subsequent checks.

6.25 The addition of a telephone intercept auditing function as discussed in paragraphs 6.107-112 would mean that some additional staff would be necessary, perhaps in the order of two to three.

6.26 *The NIIC recruiting or seconding AFP, NCA or Ombudsman's staff.* The NSW Royal Commission into the Police recommended that, to ensure public confidence in the independence and integrity of the PIC, no members or former members of the NSW Police Service should be employed by it. If considered necessary or desirable in the future, this restriction might be open to review.<sup>203</sup>

6.27 A few submissions to the Commission argued that no former or serving members of the AFP or NCA should be able to work for the NIIC. One submission also suggested that no existing staff of the Ombudsman's office should be employed by the NIIC and that a 'clean slate approach' was the only way to give credibility to a new organisation.<sup>204</sup>

6.28 *Commission's view.* The Commission does not seek to prescribe to what extent AFP or NCA officers or staff from the Ombudsman's office can be recruited by the NIIC to work as NIIC staff. However, clearly the recruiting policy of the NIIC must have as a fundamental aim that the NIIC is independent from, and will be seen as being independent from, the AFP and the NCA and the Ombudsman's office. As a general principle the number of current or former AFP, NCA and Ombudsman staff should be limited, particularly if they are to work in the investigations area. Any new personnel, whatever their past employment, would need to be subject to thorough integrity and skills testing before being recruited.

## Funding

6.29 The NIIC would be federally funded. The Commission's preliminary estimate expressed in the DRP was that core funding would be in the order of three and a half to four million dollars annually. Some supplementation of this core funding might be necessary in cases where a very extensive investigation or inquiry was necessary. The Commission's reasoning behind this estimate and responses to it are dealt with in detail in chapter 8.

## Powers

### *Investigative and inquisitorial powers*

6.30 The NIIC should have conferred on it the full range of investigative and inquisitorial powers of a royal commission. This should include powers to

- enter and search public premises and seize material

- summon witnesses to give evidence
- pursue contempt of its procedures
- obtain and execute listening device warrants
- intercept and record telephone conversations and electronic communications
- hold public and private hearings
- gain access to taxation records.<sup>205</sup>

6.31 The NIIC would conduct, manage or supervise three major types of investigations

- a full investigation conducted by itself and where necessary using its range of coercive powers
- joint investigations with the AFP and NCA (and where appropriate and practical including members of other Commonwealth or State agencies, particularly law enforcement agencies) — these investigations would normally be under the direction and control of the NIIC and where necessary the NIIC could use its coercive powers
- AFP or NCA conducting internal investigations but those investigations being managed or supervised<sup>206</sup> by the NIIC with no use of the NIIC's coercive powers.

6.32 The NIIC would have the power to make inquiries to determine whether to undertake an investigation. The NIIC would be able to change the type of investigation being carried out where it considered that it was necessary. Thus, for example, if the AFP or the NCA were conducting an investigation the NIIC could at any stage alter that to a joint investigation or a full NIIC investigation. For example, this might occur where the NIIC considered that it was necessary to have its coercive powers available.

6.33 The NIIC Act should provide that the NIIC has the power of control and direction of any investigation. It would have a discretion in the particular case as to the appropriate level of its involvement. In some cases it might manage the investigation, that is provide detailed guidance in the planning and execution of detection or investigation, including selecting the personnel involved, the method of detection or investigation, the witnesses to be interviewed and the evidence to be gathered. In other cases it might provide a lower level of guidance, relying on a system of guidelines prepared by it and progress reports and final reports furnished to it. In most cases the Commission envisages that the level of management or oversight would be achieved by agreement with the AFP or the NCA and that no formal use of the NIIC's directive powers would be necessary. The Commission expects that to the fullest extent practical the NIIC, the AFP and the NCA will consult on matters before any directive powers of the NIIC would be used. Those directive powers and the taking over of an investigation would be sparingly used, particularly in Category B, C and D matters.<sup>207</sup>

6.34 **Submissions.** The Attorney-General's Department submitted that any entry and search powers should accord with current Commonwealth policy as reflected by Part 1AA of the *Crimes Act 1914* (Cth). The Commission agrees. It is desirable to have consistent policy across the Commonwealth jurisdiction on the exercise of these powers.

6.35 The NCA agreed with the NIIC having royal commission type powers should it be established.

### ***Contempt powers***

6.36 The DRP proposed that where the NIIC finds a person guilty of contempt it may apply to the Federal Court for that Court to inquire into the matter and the Court, if satisfied that the person is guilty of contempt, may punish the person in the same manner and to the same extent as if the person was found guilty of that contempt in relation to proceedings before the Federal Court.<sup>208</sup>

6.37 **Submissions.** The Attorney-General's Department suggested that any power to punish for contempt should be drafted in such a way as to proscribe specific conduct rather than by attributing a general contempt power to the NIIC. The Commission agrees with the Department's suggestion. This accords with the Commission's recommendations in its report on contempt in relation to tribunals and regulatory bodies.<sup>209</sup>

#### ***Audit powers***

6.38 The NIIC would have the power to undertake inquiries and examine or audit any aspect of the AFP or the NCA for the purpose of discovering whether there is misconduct or circumstances that may lead to misconduct. This would include examining records and other data.

#### ***Power to recommend action after investigations***

6.39 The NIIC would have the power to make recommendations, give opinions and make assessments to the AFP or the NCA on the basis of its investigations or those of agencies which it has managed or directed. This would include recommendations for the prosecution of a person for a criminal offence or the taking of disciplinary action. The NIIC would also have the power to go directly to the DPP with a brief for a criminal prosecution.

6.40 **Submissions.** One submission expressed the view that the NIIC should be able to take action of its own motion and be able to compel or order certain results such as the taking of disciplinary action.<sup>210</sup>

6.41 **Commission's view.** The Commission proposes that the NIIC would have a very wide own motion power of investigation and inquiry. To exercise that power it would be sufficient for the NIIC to be satisfied that a matter directly or indirectly raised issues concerning the integrity or accountability of the NCA or AFP.

6.42 However, the Commission is of the view that an extensive power to make recommendations is sufficient once the NIIC embarks upon an investigation or inquiry. If the AFP or the NCA fail to accept or act on an NIIC recommendation then the NIIC will be able to report this to the Attorney-General and the Parliament. The Commission expects that the AFP or the NCA would on most occasions accept a NIIC recommendation. The Ombudsman has submitted that in her experience recommendatory powers are sufficient. To give the NIIC powers of compulsion in the sense of being able to impose sanctions for failure to comply is unlikely in practice to make any appreciable difference to actual outcomes of investigations or reports. However, it would be likely to expose the relationships between the NIIC and the AFP and NCA to avoidable antagonism. It would also weaken the power and the role of the AFP and the NCA to take adequate responsibility for complaints and discipline. It would be tilting the fine balance between the input of internal responsibility and external scrutiny too far to the external side.

#### ***Reporting on miscarriages of justice***

6.43 In performing its statutory functions the NIIC may uncover police misconduct where police have deliberately obstructed the criminal justice process. This is sometimes referred to as 'process corruption'. Process corruption is a serious form of corruption and includes

- fabrication of evidence
- suppression of evidence
- perjury.

6.44 The Royal Commission into the New South Wales Police Service has shown that process corruption may mean that some convictions which were obtained in those circumstances are questionable. The NSW Court of Criminal Appeal the Court has said

[I]n some cases, where evidence emerges that the police officers ... in a particular conviction have deliberately lied and lied in respect of important matters, it may be that the conviction will not be allowed to stand even though quite

apart from the their credibility there is independent evidence sufficient, if believed or accepted by the jury, to convict the accused.<sup>211</sup>

6.45 The NIIC should develop a procedure to consider all the ramifications of any case where it forms the view that an AFP or NCA officer may have been guilty of process corruption. The procedure should include efforts to determine the extent of the corruption and who may have been adversely affected by it. It should also include notifying relevant authorities, for example, the Attorney-General, the DPP and any person who may have been adversely affected by the suspected process corruption.

6.46 The *Crimes Act 1900* (NSW) enables a petition for a review of conviction to be made to the State Governor and an application for an inquiry into a conviction to the NSW Supreme Court.<sup>212</sup> Under either process a direction can be made for an inquiry to be conducted by a prescribed person who for the purposes of the inquiry has royal commission powers. A report is then made on the inquiry. If the prescribed person considers that there is a reasonable doubt as to the guilt of the convicted person the matter may also be referred to the Court of Criminal Appeal for consideration of whether the conviction should be quashed.

6.47 The *Crimes Act 1914* (Cth) does not have an equivalent to these NSW provisions. The Commission believes that consideration should be given to whether the Commonwealth Crimes Act should have an equivalent provision. It may help to ensure fair and effective mechanisms for review of any unsound convictions for federal offences.

### **Recommendation 16 — 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 who may have been adversely affected by it. It should also include notifying relevant authorities, for example, the Attorney-General, the DPP and any person that may have been adversely affected by the suspected corruption.

### **Recommendation 17**

Consideration should 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.

### ***Power in relation to complainants' remedies***

6.48 The DRP proposed that the Chairperson of the NIIC should be empowered by the NIIC legislation to recommend to the Commissioner of the AFP, the Chairperson of the NCA or the Attorney-General that action should be taken in relation to a complaint to rectify, mitigate or alter the effects of any act or omission by the officers of the NCA or the AFP. This would be a similar power to that of the Ombudsman under the *Ombudsman Act 1976* (Cth) s 15(2) & (3). The Ombudsman's recommendations may include:

- an apology or explanation
- financial compensation or restitution of property
- a change in decision or course of action

6.49 Where the NIIC makes such a recommendation and the AFP Commissioner or the NCA Chairperson, as the case may be, disagrees, the NIIC should be able to make a report to the Attorney-General on the matter.

6.50 As noted in the Ombudsman's submission, there should be no presumption that the complainant will, or should, take action to pursue a remedy independently of the complaints legislation such as a common law action for assault or false imprisonment. However, in exercising this power the NIIC should take into account any other remedy obtained by the complainant and the opportunity and capacity of the complainant to pursue other remedies.

### ***The power to examine policies and procedures and make recommendations***

6.51 Under the Complaints Act the Federal Police Disciplinary Tribunal may inquire into a matter relating to the AFP that is referred to it by the Attorney-General.<sup>213</sup> This power has not been used. The Commission is of the view that the NIIC should have this power as the new peak body for investigating complaints against the AFP and the NCA. The NIIC legislation should also specify that the NIIC may make recommendations to the Commissioner of the AFP, the Chairperson of the NCA and the Attorney-General on principles and practice for these organisations, including recommendations about preventing, detecting, investigating and punishing AFP or NCA misconduct.

6.52 The NIIC would not be bound by the rules of evidence and could inform itself on any matter as it sees fit.

#### **Recommendation 18 — NIIC's powers**

The NIIC should have conferred on it the full range of investigative and inquisitorial powers of a royal commission.

#### **Recommendation 19**

The NIIC's entry and search powers should accord with current Commonwealth policy as reflected by Part 1AA of the *Crimes Act 1914* (Cth).

#### **Recommendation 20**

The NIIC's power to punish for contempt should be drafted in such a way as to proscribe specific conduct rather than by attributing a general contempt power to the NIIC.

#### **Recommendation 21**

The NIIC Act should provide that the NIIC has the power of control and direction of any investigation about the AFP or the NCA in relation to a complaint or corruption.

#### **Recommendation 22**

The NIIC should have the power to make recommendations, give opinions and make assessments to the AFP or the NCA on the basis of its investigations or those of agencies which it has managed or directed.

#### **Recommendation 23**

The NIIC should have a power to make recommendations to provide a specific remedy for a complainant where it reports that a complaint is substantiated including

- an apology or explanation
- financial compensation or restitution of property
- a change in decision or course of action.

#### **Recommendation 24**

The NIIC should be empowered to inquire into a matter relating to the AFP or the NCA that is referred to it by the Attorney-General.

### **Confidentiality provision**

6.53 The Chairperson of the NIIC, its members and staff would be subject to a confidentiality provision. It would be an offence for persons to make unauthorised disclosures of information obtained in the course of

their functions or exercise of powers. In particular, the confidentiality of complainants and NIIC operations must be protected.

### **Recommendation 25 — Confidentiality provision**

The Chairperson of the NIIC, its members and staff should be subject to a confidentiality provision. It would be an offence for them to make unauthorised disclosures of information obtained in the course of their functions or exercise of powers.

## **Accountability**

### ***Accountability to the Government and Parliament***

6.54 The DRP argued that there is clearly a need for a body with the NIIC's coercive powers and with its anti-corruption and complaints functions to have a clear line of accountability to the federal Government and Parliament. Therefore, in respect of its overall activities, the NIIC should be accountable to the federal Attorney-General who would have portfolio responsibility for NIIC, thus complementing the Attorney's portfolio responsibility for the AFP and NCA. The DRP further suggested that the NIIC should be subject to oversight by the Parliamentary Joint Committee on the NCA regarding its activities in relation to the AFP and the NCA.

6.55 The NIIC would also be required to provide Annual Reports to Parliament on its operations and effectiveness. It would also have the power to make a special report to Parliament at any time.

6.56 Additional accountability is necessary in relation to complaints against the NCA as they touch upon members of State or Territory personnel who are members of staff of the NCA under the NCA Act. In such cases the NIIC should be required to report regularly to the Australasian Council of Police Ministers. In relation to NCA complaints as they touch generally upon the members of State or Territory public services and police forces the NIIC should also be required to report regularly to the IGC.

6.57 The NSW Royal Commission into the Police recommended that there should be an Inspector of the PIC to be a watchdog to audit functions of the PCC, to deal with complaints of abuse of power and other forms of misconduct on the part of its employees and to report to Parliament on matters affecting the PCC and its operational effectiveness or needs.<sup>214</sup>

6.58 The DRP did not consider that an Inspector would be necessary in the context of the NIIC. Having an Inspector above the NIIC would be adding an additional layer of review with its attendant costs and delays and where the ultimate source of accountability should be and must be the Government and Parliament. The NIIC should be required to report to those institutions on its effectiveness and on the probity and legitimacy of its conduct. There would also be review available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of appropriate NIIC decisions and judicial scrutiny of its coercive powers.

6.59 **Submissions.** The Attorney-General's Department held the view that the PJC should not have any oversight of the NIIC particularly as it has already stated that it lacks the time and resources to deal adequately with individual complaints.<sup>215</sup> The accountability of the NIIC to the Attorney-General who in turn is accountable to Parliament would be sufficient.

6.60 The NCA agreed that the PJC could not investigate complaints because it did not have the time or the resources and because it might have some conflict of interest between its statutory role in relation to the NCA and to the NIIC.<sup>216</sup> However, the NCA considered that accountability to the Attorney-General would be inadequate and there should be a means by which the performance of the PJC can be examined, for example, by a Parliamentary Committee.

6.61 The PJC advised the Commission that it would be most reluctant to have its statutory duties enlarged to encompass a similar role in relation to the NIIC.<sup>217</sup> In addition, the PJC did not wish to assume any role in relation to the AFP.

6.62 **Commission's views.** The Commission considers that the political accountability to the Attorney-General would provide sufficient oversight of the NIIC. The Attorney-General's Department supported this view. The Commission also proposes that the Chairperson of the NIIC and the Attorney-General's Department establish a protocol for their communications and for contact with the Attorney-General. The Commission would expect that the protocol would include an arrangement for routine briefing and reporting procedures for significant matters. The NIIC legislation should also provide that the Attorney-General may require the Chairperson of the NIIC to provide a report on any activity carried out by the NIIC. This would be in addition to the NIIC's requirement to provide Annual Reports.

***Obligation on AFP and NCA officers to report misconduct and evidence of misconduct***

6.63 The DRP proposed that every AFP appointee other than the AFP Commissioner and every NCA staff member other than the NCA Chairperson would be obliged to report a 'reportable matter' as soon as practicable to the Commissioner of the AFP or the Chairperson of the NCA respectively and to the NIIC. A 'reportable matter' would mean any information derived from any source (including a complaint, report, audit, intelligence source, informant or record) concerning

- the commission of, or a reasonable suspicion of, the commission of a criminal offence by an AFP appointee or NCA member of staff
- a breach of, or the reasonable suspicion of, the breach of a conduct rule by an AFP appointee or NCA member of staff
- conduct, or the reasonable suspicion of conduct, by an AFP appointee or NCA member of staff that is otherwise contrary to law

6.64 A wilful or intentional failure to report such information would constitute a criminal offence. A negligent or careless failure would constitute a breach of discipline.

6.65 The Commissioner of the AFP and the Chairperson of the NCA would be under the same obligation but must report the matter only to the NIIC.

6.66 The only exceptions to these reporting obligations would be those cases where the person knew that the matter had already been reported or it was a matter to be dealt with under Category C (Customer Service) or D (Internal Management) where there would be other reporting obligations to the designated supervisor.<sup>218</sup>

6.67 **Submissions.** The AFP submitted that 'reportable matter' needs to be defined more clearly, particularly as it is to be the basis upon which criminal or disciplinary action is taken against an appointee.<sup>219</sup> It suggested that a criminal offence for appointees who fail to report a non-serious breach of a disciplinary rule may be draconian. The submission suggested that professional reporting needs to become a core feature of the duties of all personnel of the AFP, the failure to do so attracting management rather than criminal sanctions. It argued that criminal sanctions need only be imposed where there has been wilful neglect to report an appointee who has committed, or is suspected to have committed a criminal offence or a serious disciplinary breach. Inattentive or careless disregard for reporting requirements can be adequately dealt with as a management issue. The AFP was of the view that overall the attitude and commitment of AFP appointees to professional reporting is more relevant to suitability for continued employment than simply discipline or criminal sanctions and often may be best dealt with by the Commissioner under the provisions of s26E and s26F of the AFP Act.

6.68 The AFP argued that generally there should be no obligation on appointees to report a matter that comes to their attention via court proceedings or the media. Examples include allegations put to a member under cross-examination, otherwise raised in a court of law, or in media reports.

6.69 The AFP further submitted that the obligation to report a reportable matter should extend to public servants, State and Territory police, court officials and others working with AFP appointees. The obligation should also apply to, for example, multi-jurisdictional and multi-agency task forces as well as joint investigations.

6.70 The Victoria Police supported this recommendation and advised that it has already implemented policy and instructions which require every employee of the Force to report an act or suspected act of criminality, corruption or serious misconduct by any other employee of the Force.<sup>220</sup>

6.71 *Commission's views.* The Commission has reconsidered this issue and believes that the following changes to its proposals are necessary.

6.72 An AFP appointee should face a criminal charge in relation to a wilful or intentional failure to report as soon as practicable, when that appointee is under a duty to do so, the commission of, or a reasonable suspicion of, the commission of a criminal offence by an AFP appointee. There should be a defence that the person had a reasonable belief that there was no obligation upon him or her to report the matter or that he or she had a reasonable belief that he or she had discharged the obligation. A negligent or careless failure should constitute a disciplinary offence with the same excuse of reasonable belief.

6.73 The failure to report a breach of a disciplinary rule or a breach of the law other than a criminal law when under a duty to do so should be the subject of a disciplinary proceeding. The defence of reasonable belief should also apply.

6.74 The Commission also considers that the obligation to report in relation to criminal offences should be both to the Commissioner and the NIIC. However, in relation to disciplinary matters or other breaches of law the matter should be reported only to the Commissioner unless guidelines developed by the NIIC prescribe that certain disciplinary matters and breaches of the law other than criminal matters should also be reported to it. The Commissioner should also be required by the legislation to keep a register of all reports made under this section and action taken.

6.75 Each of these provisions should apply in the case of the NCA.

6.76 These provisions take into account the concerns of the AFP about using the criminal law in relation to failing to report disciplinary matters. The Commission's proposal as it was in the DRP could potentially cause significant inconsistency in treatment. A person who deliberately failed to report a disciplinary offence would face criminal sanctions whereas the person who committed the disciplinary offence might not. This would have blurred the proper distinction between disciplinary matters and criminality.

6.77 The Commission considers that these changes should remove any difficulties with the application of these proposals to court proceedings and media reports. An appointee would only be under a duty where he or she knew or had reasonable suspicion about the matter and there would be a defence available of reasonable belief. The AFP could also prescribe procedures about how the obligation would apply to all its personnel. For example, the reporting duty for the Queensland Police Service requires the officer to take all action prescribed by the regulations as action to be taken in the circumstances of the case and to be within the authority of an officer of the rank or description to which that officer belongs.<sup>221</sup>

6.78 The question as to whether these reporting obligations should extend to non-AFP appointees to the width suggested by the AFP is beyond the Commission's current terms of reference. A proper consideration of the matter would require considerable consultation with the relevant agencies. In principle the extension might be desirable. However, the Commission does recommend that a similar provision should apply to NIIC staff with a duty to report in relation to their own officers and also in relation to AFP and NCA officers.

### **Recommendation 26 — Duty to report misconduct**

An AFP appointee should face a criminal charge in relation to a wilful or intentional failure to report as soon as practicable, when that appointee was under a duty to do so, the commission of, or a reasonable suspicion of, the commission of a criminal offence by an AFP appointee. There should be a defence that the person had a reasonable belief that there was no obligation upon him or her to report the matter or that he or she had a reasonable belief that he or she had discharged the obligation. A negligent or careless failure should constitute a disciplinary offence with the same excuse of reasonable belief.

The failure to report a breach of a disciplinary rule or a breach of the law other than a criminal law when under a duty to do so should be the subject of a disciplinary proceeding. The excuse of reasonable belief should also apply.

The same provisions should apply to the NCA.

Similar provisions should apply to NIIC officers so that they have a duty to report in relation to their staff and also in relation to AFP and NCA officers.

### ***Complaints against the NIIC***

6.79 The DRP suggested that there should be a clear procedure to deal with complaints made against the NIIC or its staff. It was suggested that the NIIC Act should provide that the Chairperson of the NIIC must report to the PJC any complaint of misconduct against the NIIC or its staff and that the Act should provide courses of action for the PJC such as requiring a report from the Chairperson of the NIIC on the matter.

6.80 **Submissions.** The PJC advised the Commission that it did not support its having any role in relation to the NIIC including any consideration of complaints made against it.<sup>222</sup> The Attorney-General's Department and the NCA also were opposed to the PJC having any role in the handling of complaints against the NIIC.<sup>223</sup>

6.81 **Commission's views.** In the light of the strong opposition to the proposal in the DRP the Commission now considers that an alternative is necessary. The NIIC should be required to report to the Attorney-General any complaint of misconduct against it or its officers. The Attorney-General's Department and the NIIC as part of their protocol should establish procedures for the reporting of complaints and action that should be taken in response including monitoring and review.

### **Recommendation 27 — Accountability**

The NIIC should be accountable to the federal Attorney-General who would have portfolio responsibility for NIIC thus complementing the Attorney's portfolio responsibility for the AFP and NCA.

### **Recommendation 28 — Duty to report a 'reportable matter'**

Every AFP appointee other than the AFP Commissioner and every NCA staff member other than the NCA Chairperson would be obliged to report a 'reportable matter' as soon as practicable to the Commissioner of the AFP or the Chairperson of the NCA respectively and to the NIIC.

### **Recommendation 29 — Complaints against the NIIC**

The NIIC Act should provide that the Chairperson of the NIIC must report to the Attorney-General any complaint of misconduct against the NIIC or its staff. The Attorney-General's Department and the NIIC as part of their protocol should establish procedures for the reporting of complaints and action that should be taken in response including monitoring and review.

## Intelligence data

### *DRP's proposals*

- 6.82 The DRP proposed that the NIIC should have an intelligence database that would collect, analyse and disseminate information particularly about criminal activities including corruption. The DRP also proposed that
- there must be internal security guidelines to ensure that material is secure
- appropriate liaison and protocols with law enforcement agencies should be established about the exchange of information
- the Federal Privacy Commissioner should be able to conduct audits and review of the collection of data
- the intelligence data should be exempt from the provisions of the *Freedom of Information Act 1982* (Cth).

6.83 **Submissions.** The Attorney-General's Department suggested that the NIIC should be subject to the *Privacy Act 1988* (Cth).<sup>224</sup> The Privacy Commissioner would then be able to audit the information handling process of the NIIC and could report to the Attorney-General.

6.84 The Department submitted that the NIIC's intelligence data base also raises privacy issues in relation to the disclosure of any personal information to State and Territory law enforcement bodies. The exception in IPP 11.1(e) permits the disclosure of personal information where it is reasonably necessary for the enforcement of the criminal law. Privacy concerns arise in relation to the secondary disclosure of the information by State and Territory law enforcement bodies who are by and large not subject to any privacy regime in relation to personal information. The Department submitted that the NIIC, may in the absence of any privacy legislation operating in relation to a particular State or territory law enforcement agency, rely on protocols with such agencies for the protection of personal information exchanged. Information should not be exchanged unless the obligations as to the protection of personal information are clear.

6.85 The AFP considered that the collection of intelligence is paramount to the successful identification of corruption and misconduct.<sup>225</sup> It added that the AFP currently collects information resulting from the investigation of complaints, the auditing of units, the security vetting of personnel and by other means. The AFP argued that irrespective of the role of the external body it is critical that the AFP continue to collect and hold intelligence data of this kind. The AFP also proposed that an exemption from the *Freedom of Information Act 1982* (Cth) should apply to intelligence data held by the AFP on criminal and corruption activities and suspected activities of AFP appointees.

6.86 The Victoria Police supported this recommendation and advised that it currently operates complaint and investigation databases and is well on the way to establishing an improved database which is similar to the PRIDE system operated by the New York Police Department.<sup>226</sup>

6.87 The NCA submitted that it was not clear why the NIIC should have this capacity and questioned whether it might not duplicate work undertaken elsewhere such as the Australian Bureau of Criminal Intelligence (ABCI).<sup>227</sup>

6.88 **Commission's views.** The majority of submissions that have addressed this issue have recognised that the NIIC must have an effective intelligence database if it is to deal with complaints and corruption. In the Commission's view this is a fundamental requirement. Intelligence gathering is particularly crucial in dealing with corruption. The Commission acknowledges that there are other bodies, including the AFP, the NCA, the ABCI and State and Territory law enforcement agencies that already have criminal intelligence databases. Accordingly the NIIC database should be designed and maintained after consultation with the AFP, the NCA and these other relevant agencies. Duplication of resources and effort should be avoided and appropriate protocols for the exchange of information should also be developed.

6.89 The Commission accepts the suggestion of the Attorney-General's Department that the NIIC should be subject to the Privacy Act as a desirable measure to ensure the proper consideration of privacy issues in the context of law enforcement activities. The Commission also considers that the *Freedom of Information Act 1982* (Cth) should also apply to the NIIC.

### **Recommendation 30 — Intelligence database**

The NIIC should have an intelligence database that would collect, analyse and disseminate information particularly about criminal activities including corruption.

### **Recommendation 31**

The NIIC database should be designed and maintained after consultation with the AFP, the NCA and other relevant agencies. Duplication of resources and effort should be avoided and appropriate protocols for the exchange of information developed.

### **Recommendation 32 — Privacy Act and Freedom of Information Act to apply**

The NIIC should be subject to the provisions of the *Privacy Act 1988* (Cth). The Privacy Commissioner should audit the information handling process of the NIIC and report to the Attorney-General. The *Freedom of Information Act 1982* (Cth) should also apply.

## **NIIC research and policy role and related reporting obligations**

6.90 A key statutory function of the NIIC would be to keep under continuous review trends relating to relevant aspects of AFP and NCA conduct coming to its notice and in particular trends relating to

- the incidence of particular types of complaint
- timeliness in the handling of complaints by AFP and NCA processes
- disciplinary outcomes.

The legislation should also require the NIIC to consider formulating policy recommendations in regard to action that might be taken by governments, the AFP and the NCA in response to established and emerging trends. This would include identifying systemic issues and problems. The NIIC should also conduct research into probity and ethical issues relevant to the exercise of investigative powers by Commonwealth agencies including the AFP and the NCA.

6.91 The NIIC should also be obliged to report relevant trends, data and policy recommendations (including in confidence where appropriate) to the federal Government and State governments and relevant Commonwealth and State agencies including the AFP, the NCA, Commonwealth Law Enforcement Board and the Parliamentary Joint Committee on the NCA and the NIIC.

6.92 The outcomes of the research and policy work of the NIIC should be required to be published at large except where operational security or privacy laws dictate otherwise.

### **Recommendation 33 — Research and policy role**

The NIIC should keep under continuous review trends relating to relevant aspects of AFP and NCA conduct coming to its notice and in particular trends relating to complaints and corruption. It should also monitor AFP and NCA cultures and undertake research relating to complaints and corruption and make recommendations on those matters.

### **Recommendation 34**

The outcomes of the research and policy work of the NIIC should be published at large except where operational security or privacy laws dictate otherwise.

## **Possible extensions to the NIIC's work and jurisdiction**

### *National approach to investigations*

6.93 It is increasingly common in Australian jurisdictions for one police service to request the assistance of other police services in the conduct of a major investigations concerning serious police misconduct within that service. For example, the AFP has assisted the Western Australian Police in the investigation of WA police internal investigations into the Argyle diamond case. This external input into investigations can be very valuable because it gives greater credibility to the independence of the investigation. Every service in some circumstances might want to consider or use this option. At the moment these arrangements are entered into on an ad hoc, informal basis.

6.94 The DRP considered that this process of interchange should be given a more formal basis. It proposed that a body such as the Australian Police Ministers' Council could develop a national scheme for investigations including accreditation for investigators with appropriate skills and integrity checks and arrangements for the interchange or sharing of information, facilities, equipment and other resources. Leasing agreements as to equipment and facilities might be one option.

6.95 *Submissions.* The Victoria Police submitted that the exchange of a wide range of internal investigations personnel between Australasian jurisdictions should be considered as a means of sharing and developing skills and current practices in this area of policing. This proposal had been given support at the 5th Australasian Internal Investigations Seminar and at the Senior Officers' Group of the Australian Police Ministers' Council.

### **Recommendation 35 — Developing a national scheme**

A body such as the Australian Police Ministers' Council should consider developing a national scheme for investigations including accreditation for investigators with appropriate skills and integrity checks and arrangements for the interchange or sharing of information, facilities, equipment and other resources.

### *Potential for further federal jurisdiction*

6.96 A number of federal agencies other than the NCA and the AFP are involved in aspects of law enforcement and may have some similar investigative and enforcement functions. For example, the Australian Securities Commission has responsibility for investigating offences under the corporations legislation. It conducts investigations, including surveillance and public hearings. Other agencies with investigative powers and a role in dealing with criminal offences include the Australian Customs Service, the Australian Taxation Office, the Department of Social Security, the Health Insurance Commission and the Australian Competition and Consumer Commission.<sup>228</sup>

6.97 The Commission's terms of reference extend only to a consideration of systems for the AFP and the NCA. The DRP suggested that consideration should be given to the NIIC having jurisdiction to handle complaints involving some or all of these other agencies when they exercise any law enforcement powers.

This would be on the basis that the same general issues are raised in terms of considering individual civil liberties and the need for practical and effective law enforcement. Each agency would contribute to the NIIC's funding in proportion to its likely involvement with the NIIC's functions. This extended federal role for the NIIC might assist to achieving an appropriate and consistent federal approach to complaints and corruption and do so in the most cost efficient way.

6.98 *Submissions*. A number of submissions supported the NIIC becoming a body that reviewed the broad spectrum of federal law enforcement.<sup>229</sup>

6.99 The Attorney-General's Department has commented that if the NIIC is established it would be an available instrument for raising investigative standards and anti-corruption measures generally. The possibility of corrupt activity is present in any organisation that enforces the law. The NIIC would therefore constitute a positive move to establishing strong anti-corruption measures in all such agencies. The Department considered that there should be a consolidation period for the NIIC in its oversight of the AFP and the NCA before any extension of its jurisdiction to other federal agencies could be considered.

6.100 The AFP fully supported the interchange of investigators and the sharing of information, facilities, equipment and other resources between agencies, including the formation of multi-jurisdictional task forces to deal with corruption and serious complaints. It noted that the AFP has already assisted other jurisdictions to investigate corruption within their organisations.

6.101 The NCA rejected any extended jurisdiction for the NIIC but did not give its reasons for this view. The Commission assumes that the NCA gave this opinion on the basis that the issue required separate analysis and inquiry.

6.102 *Commission's views*. The suggestion that the role of the NIIC could be extended to other aspects of federal law enforcement has received strong support. The Commission suggests that active consideration should be given to this proposal if the NIIC is established.

### **Recommendation 36 — Potential for extended jurisdiction**

If the NIIC is established, active consideration should be given to the proposal that its role should be extended to other aspects of federal law enforcement.

#### ***A uniform Australian law enforcement complaints and disciplinary system***

6.103 Each Australian jurisdiction faces the same broad issues in dealing with complaints against its law enforcement agencies. It is argued in chapter 13 in the context of preventing the causes of complaints and corruption that a national standard and system for many aspects of law enforcement might be desirable.

6.104 The DRP commented that a system that provided one uniform complaints and disciplinary system might well have advantages in providing a cost effective and integrated response to problems that often transcend State and Territory borders. This system would be more feasible if there was in place a national standard for recruitment and training and for core professional competencies as discussed in chapter 13. The introduction of one uniform complaints and disciplinary system would require considerable consultation and agreement between the federal, State and Territory Governments and their law enforcement agencies together with the need for uniform legislation. The Commission in the context of this inquiry has merely highlighted it as an option for the future.

6.105 *Submissions*. The Attorney-General's Department has commented that consistent federal State and Territory legislation regarding complaints and disciplinary procedures would be ideal. However, according to the Department there are practical difficulties including the different structures and varying orders and instructions of the AFP and State and Territory police services. There may also be a reluctance from the States and Territories and from within the police services themselves to implement such a proposal. However, broad national standards for police complaints and disciplinary systems could be drafted but the implementation of these standards would probably be a matter for individual jurisdictions.

6.106 The Victoria Police submitted that there were wide divergences in approach in different jurisdictions and therefore the pursuit of consistent legislation rather than uniform legislation might be more practical. This would seek to achieve national standards while leaving room for local differences.

### **Recommendation 37 — Developing national standards**

Consideration should be given to developing national standards for law enforcement complaints and disciplinary standards. This process could be begun through bodies such as the Australian Police Ministers' Council.

#### ***Intercept audit function***

6.107 Subject to certain specified controls, the *Telecommunications (Interception) Act 1979* (Cth) empowers the AFP and the NCA to intercept telephone communications. The Ombudsman has an audit function under the Act.<sup>230</sup> The AFP and NCA must maintain records to verify their compliance with the Act. The Ombudsman's office must inspect AFP and NCA records at least twice a year to ascertain compliance with the record keeping requirements as well as the accuracy and completeness of the records. The Ombudsman must report her findings to the Attorney-General as well as any other breaches of the Act which become apparent.

6.108 The Ombudsman has reported that, as a result of budgetary restraints and funding cuts to her Office, she has inadequate resources to maintain a high level of scrutiny in her intercept audit function.<sup>231</sup> The Ombudsman suggests that with existing resources it is unlikely that she will detect contraventions of the Act and there will be no capacity for investigating suspected contraventions.<sup>232</sup> She argues that this will cause greater risk of misuse of intercepted material and have significant implications for the privacy objectives of the Act.

#### ***Commission's views***

6.109 It might be argued that this issue is not within the terms of reference of this inquiry because the legislation concerned is not directly connected with complaints or disciplinary matters involving the AFP or NCA. However, as suggested in chapter 2 in relation to considering corruption generally within this inquiry, the issue of telephone interceptions is a matter directly concerned with AFP and NCA accountability and integrity.

6.110 The Ombudsman's current role in telephone intercept audits is the subject of some concern. It has been argued that the efforts of the Ombudsman's office have achieved very little by way of scrutiny and accountability.<sup>233</sup> Given the enormous cost incurred by law enforcement agencies in connection with the execution of telephone interceptions,<sup>234</sup> the clear civil liberties implications and issues of police accountability there is an obvious need for effective and vigilant scrutiny of police operations in this area.

6.111 The Commission is of the view that consideration should be given to extending the NIIC's role to include the telephone intercept audit function currently within the Ombudsman's jurisdiction. The NIIC's complaints and corruption investigative role and its auditing and intelligence capacities would place it in an effective position to carry out the intercept audit function. If the NIIC were to take over this role, the Ombudsman's expenditure in conducting this function should be off-set as a contribution to the NIIC providing the service.

6.112 A question which would arise if the NIIC assumed the role is how would any telephone interception conducted by the NIIC be audited? The Commission considers that this matter should be dealt with under the protocol established for communications and contact between the NIIC and the Attorney-General as discussed in paragraph 6.62. In addition to the provision of Annual Reports, the NIIC should also disclose information to the Attorney-General about telephone intercepts.

**Recommendation 38 — Intercept audit function**

Consideration should be given to the NIIC auditing telephone intercepts conducted by the AFP and the NCA.

# 7. The NIIC's investigative procedures and relationship with the AFP and NCA

## Introduction

7.1 This chapter discusses the NIIC's investigative procedures including categories for complaints and guidelines for investigations. It also examines the investigative relationship between the NIIC and the AFP and NCA respectively including the role of the AFP's Internal Investigations Division (IID).

## The general relationship

7.2 The relationship between the NIIC and the AFP and the NCA needs to be at arms length but there must also be a spirit of co-operation and an effective working relationship. The nature of the relationship generally cannot be entirely prescribed by legislation but it is clearly of the greatest importance.

7.3 The NIIC must be independent and be seen to be independent. That is a fundamental requirement. The right balance between independence and co-operation must be constantly sought generally and in relation to individual matters. The NIIC management must by its recruiting policies and its operating guidelines and principles recognise the risks of the NIIC becoming the captive of the law enforcement agencies or being 'too comfortable or too intimate' with those agencies.

7.4 It would not be a static relationship. Efforts must be made to avoid a paper war between the external body and the law enforcement agency.<sup>235</sup> Minor details can often be best dealt with by telephone or direct contact.

7.5 In practice the Commission would expect that the AFP Commissioner, the NCA Chairperson and the NIIC Chairperson would have strong lines of communication and regular meetings. There would be a free flow of information subject to the very rare occurrence where there was a concern about the integrity of one of the executives of an agency.

## Categories of complaints

7.6 The DRP proposed a system for classifying complaints. Classifying complaints is an essential element in developing appropriate responses to the full range of complaints. The DRP stressed that classifications should not be used to try to provide rigid definitions; nor in practice could they be. Their main purpose is to provide effective streaming of matters so that resources, particularly investigative resources, are allocated efficiently and, for example, target serious matters for greater attention.

7.7 The detailed characteristics or criteria for determining which is the appropriate category for a particular complaint would not be included in the legislation. The legislation would, however, provide for the NIIC to issue guidelines concerning categories for complaints. The NIIC would have the power to determine the appropriate category for any particular complaint. The AFP and the NCA would each be under a statutory obligation to give full access to the NIIC to all records relevant to the complaint and the NIIC would have power to interview all personnel involved. The NIIC would also have power to reclassify the complaint to another category or redirect the manner of handling.

- 7.8 The NIIC would consult with the AFP and the NCA about the content of the guidelines. The DRP proposed that there should be four main categories:
- Category A — serious criminality, corruption or significant public interest
- Category B — serious misconduct
- Category C — customer service matters
- Category D — internal management matters.

7.9 The recommendations below concerning the investigation of complaints against the NCA's seconded staff or joint task force staff might require complementary State and Territory legislation to render State and Territory personnel subject to the proposed complaints regime. Such legislation might be necessary to enable the NIIC to fully investigate complaints as they concern State or Territory personnel. The issue of whether complementary legislation would be necessary should be further considered in consultation with relevant agencies including State and Territory police services.

***Category A — Serious criminality, corruption or significant public interest***

7.10 This would include matters

- involving serious criminality such as those matters that would constitute an indictable offence, for example, murder, the infliction of grievous bodily harm or serious injury (eg involving fractured or broken bones or otherwise requiring hospitalisation), serious fraud or theft, blackmail, bribery, dangerous conduct with a firearm, perjury and falsifying evidence
- where the public interest may require an investigation completely external to the subject agency or with only limited input from the subject agency.

***Category B — Serious misconduct***

7.11 These are matters where a less serious criminal action or significant disciplinary action might be warranted -- for example, assault, minor theft, significant dereliction of duty, misdirected search and seizure, or activities outside the terms of a warrant.

***Category C — Customer Service complaints (minor)***

7.12 This category constitutes the majority of complaints and includes minor breaches of police rules and procedures, rudeness, incivility, a perception of threat or menace, and misunderstandings as to facts and law.

***Category D — Internal management matters (minor)***

7.13 These are matters where there is no allegation or implication of misconduct but managerial action is called for.<sup>236</sup> This would include minor incidents of loss or damage to police property and absence from duty. Under the Commission's recommendations for an increasing managerial role, these matters should be dealt with by management including performance appraisal, rather than the misconduct process. Few matters of this nature should come to the direct attention of the NIIC. However if they do the NIIC should be able to refer them back to management for appropriate action and be able to review any decision taken.

***Dealing with the categories***

7.14 For Category A matters the NIIC would be the investigator. Any AFP or NCA input would be at the request of the NIIC and subject to its close and direct control.

7.15 For Category B matters, while the NIIC would still have the capacity for overall control and direction, the input of the AFP and NCA would be likely to be greater than for Category A matters and the NIIC would also be likely to have less direct management of investigations.

7.16 The AFP and NCA would ordinarily have primary and direct responsibility for handling Category C and D matters but subject to NIIC guidelines and auditing.

7.17 The Commission would stress that the NIIC would have the overall power of direction and control for any complaint. It could choose to investigate a matter in any category or determine that a matter should be moved from one category to another.

7.18 The following sections explain how the Commission considers that the system of classifications should work in practice.

## **Dealing with Category A complaints (serious criminality, corruption or significant public interest)**

7.19 Where a complaint is received directly by the AFP or NCA and it appears to be a Category A complaint, the AFP or NCA should take no action in relation to the complaint (subject to preserving evidence) until the complaint had been registered with the NIIC and the NIIC has given directions as to its handling. Where delay in handling a Category A complaint until registration and consideration by the NIIC might prejudice the outcome of the complaint, the AFP or NCA should be able to seek oral confirmation and directions from the NIIC regarding immediate interim action.

### ***Category A Complaints concerning the AFP***

7.20 Where a complaint appears to the NIIC to be a Category A complaint the NIIC will usually investigate the matter itself. The seriousness of complaints in this category or the significant public interest that they raise would usually mean that the NIIC would have direct control and conduct of any investigation. The NIIC would determine any input from the AFP. For example, it is likely that the NIIC would conduct the entire investigation itself with no personnel from the AFP involved if the complaint concerned the Commissioner of the AFP or a Deputy Commissioner.

7.21 The NIIC would be able to request specified assistance from the AFP including personnel and the use of facilities and equipment.

7.22 The Chairperson of the NIIC could exercise the inquisitorial powers of NIIC alone or with one or more Commissioners. Alternatively the NIIC might appoint a special investigator, who would be a suitably qualified legal practitioner or a current or former judge, to exercise these inquisitorial powers on its behalf with or without the assistance of one or more NIIC Commissioners.

7.23 Where the NIIC conducts an inquiry it should consult appropriately with the DPP to ensure that it is properly resourced and advised regarding the preparation of a brief of evidence for any prosecution that may follow.

7.24 The NIIC would publish general guidelines for the handling of Category A investigations by special investigators. The guidelines would deal particularly with the matter of regular reporting to the NIIC of progress on investigations. In addition to the guidelines, the NIIC should, in consultation with the special investigator, establish a timetable for the conduct of a particular investigation and require timely reasons in writing where adherence cannot be achieved.

7.25 The NIIC would also publish, in relation to AFP involvement in a NIIC investigation, guidelines that deal with the conduct of investigations, including the chain of command and supervision.

7.26 Upon the completion of an investigation the NIIC would

- direct that the report and any relevant brief of evidence be transmitted to the DPP with any recommendations that the NIIC may wish to make, or
- direct that the report or any part of it be referred to the AFP Commissioner for consideration of any recommendations for disciplinary or other action as the NIIC considers appropriate, or
- direct that no further action be taken.

7.27 Where the NIIC determined that a complaint that initially appeared to be a Category A matter should in fact be more appropriately classified differently it would be able to amend the classification accordingly.

7.28 Where a Category A matter appears to be connected to matters involving non-AFP appointees the NIIC would be empowered to enter into suitable arrangements with any federal, State or Territory agencies or any investigative body for co-operation or assistance. This might include the formation of task forces or joint investigations.

### ***Category A complaints against the NCA***

7.29 The NIIC would usually investigate a Category A matter directly itself with its full range of coercive powers available. The NIIC would determine any input from the NCA. The NIIC would have the same powers and options as described above in relation to Category A matters for the AFP. However, in the case of the NCA it is more likely that complaints will involve personnel from different federal, State and Territory agencies.

7.30 Where AFP appointees are concerned the NIIC would be able to deal directly with the matter itself without the need for further consultation. However, where it appeared to the NIIC that a complaint against the NCA or a staff member was a Category A complaint that went *beyond the conduct of AFP* seconded personnel, the NIIC would consult with any State or Territory agency whose staff were involved as to the appropriate course of action including the matter's investigation. Preferably the NIIC and all relevant State and Territory agencies should develop memoranda of understanding on the process of investigation of complaints involving the NCA and seconded staff, consultants or joint task force members. One option that should be available and specified in the legislation is the establishment by the NIIC of an Investigatory Board to assist it in investigating the complaint or aspects of the complaint.

7.31 The legislation should not prescribe narrowly the composition of any Board. It would be preferably a matter for the NIIC and the relevant agencies to determine in the particular circumstances. In practice, however, a Board would be likely to consist of

- the Chairperson or a member of the NIIC, or a Special Investigator appointed by the NIIC, as chair of the Board
- such expert investigators as the NIIC determines — these could, in appropriate cases, be AFP investigators
- where the complaint relates to the conduct of a public servant or a police officer seconded from a State or Territory public service or police force, a person selected by the NIIC from a standing panel of experts proposed by the State or Territory Minister responsible for that public service or police force and agreed to by the NIIC, being a panel of persons qualified to advise on the preparation of any brief of evidence of the commission of any offence against the laws of that jurisdiction or the disciplinary regime applying to public servants or police officers of that jurisdiction
- where the complaint relates to a staff member of the Australian Public Service, a person selected by the NIIC from a panel of experts proposed by the Public Service and Merit Protection Commission and agreed to by the NIIC, being a panel of experts in the APS disciplinary regime
- where the complaint relates to a staff member who is a trade or professional consultant (not being a member of a Commonwealth, State or Territory public service or police force), a person selected by the NIIC from a panel of experts proposed by the professional or trade body having professional disciplinary responsibility for that person's conduct and agreed to by the NIIC, being a panel of persons expert in the relevant disciplinary regime relating to that trade or profession
- such other experts as the Commission considers necessary to ensure that the panel has expertise in relation to the preparation of any brief of evidence that might arise as a result of its investigations.

7.32 An Investigatory Board should, through the Chairperson, exercise all the investigating powers of the NIIC necessary to facilitate its investigation.

7.33 An Investigatory Board should report the outcome of its investigation to the NIIC together with any brief of evidence it has completed relating to possible breaches of Commonwealth or State law or disciplinary regimes applicable to affected members of the staff of the NCA.

7.34 The NIIC would, after considering the report of the Board

- refer any brief of evidence to the appropriate DPP, recommend that the AFP or the NCA take disciplinary action under their own disciplinary systems as proposed in chapter 10 or send the matter to the Commonwealth, State or Territory home agency or disciplinary authority, or
- direct that further investigations be carried out, or
- determine that no action should be taken.

## **Dealing with Category B complaints (serious misconduct)**

7.35 As with Category A complaints, where a complaint received directly by the AFP or NCA appears under the guidelines to be a Category B complaint, the AFP or NCA would take no action in relation to the complaint until the complaint had been registered with the NIIC and the NIIC had given directions as to its handling. This would be subject to any requirements on the AFP and the NCA to preserve evidence. Where a delay in handling a Category B complaint until registration and consideration by NIIC might prejudice the outcome of the complaint, the AFP or NCA would be required to seek oral confirmation and directions from the NIIC regarding immediate interim action.

### ***Category B complaints involving the AFP***

7.36 The NIIC would have the following main options for these complaints

- require the AFP Commissioner to conduct an internal investigation with no use of the NIIC's coercive powers but subject to the management or supervision of the NIIC
- conduct the investigation but with involvement from the AFP and, where appropriate, members of other Commonwealth or State agencies, particularly law enforcement agencies — these investigations would be subject to the appropriate level of either management or oversight by the NIIC and where necessary the NIIC could use its coercive powers
- investigate the matter directly itself (with its full range of coercive powers available) where it considers that the nature of the complaint is such that it ought to conduct the entire investigation by itself — this would be the only option available if the complaint concerned the Commissioner of the AFP or a Deputy Commissioner
- refer a complaint that concerns the AFP generally to the Commissioner of the AFP for consideration and response.

7.37 The majority of Category B complaints are likely to be dealt with by the AFP conducting an internal investigation, but under the management or supervision of the NIIC. The IID would still have its current statutory role and powers. The Commission proposes that the investigation function of the AFP's Internal Security and Audit (ISA) should be consolidated into the IID.<sup>237</sup>

7.38 If at any stage during the course of a NIIC investigation the NIIC believed that a criminal offence may have been committed it would immediately begin to prepare a brief of evidence seeking, where appropriate, the advice of the Commonwealth DPP, particularly in relation to evidentiary requirements.

7.39 The report of the IID, or of the NIIC's own staff, into a complaint would be considered by the full Commission of the NIIC which could direct that

- the report and any accompanying brief be sent to the DPP for consideration and appropriate action
- the report be sent to the AFP Commissioner for consideration and appropriate action
- the matter not be proceeded with.

7.40 The NIIC would regularly review progress in an investigation of a Category B matter up to submission of the report to it and would be able to, where it considers it appropriate, reclassify the complaint as a Category A or Category C complaint and give an appropriate direction as to its future handling.

7.41 The NIIC guidelines would specify time limits for the completion of various phases of the investigation by IID and its own staff. Both the AFP investigators and the investigative staff of the NIIC would be required to provide timely written reports explaining why time limits have not been adhered to.

### ***Category B complaints against the NCA***

7.42 The NIIC would have the following main options

- refer a complaint about the actions of a staff member to the Chairperson of the NCA for investigation and report with no use of the NIIC's coercive powers but subject to the management or supervision of the NIIC
- conduct the investigation but with involvement from the NCA and, where appropriate, members of other Commonwealth or State agencies, particularly law enforcement agencies — these investigations would be subject to the appropriate level of either management or oversight by the NIIC and where necessary the NIIC could use its coercive powers
- investigate the matter directly itself (with its full range of coercive powers available) where it considers that the nature of the complaint is such that it ought not be investigated internally by the NCA in the first instance — this would be the only option available if the complaint concerned the Chairperson of the NCA or a member
- refer a complaint that concerns the NCA generally to the Chairperson of the NCA for consideration and response.

7.43 If at any stage the Chairperson of the NCA formed the view, in relation to a matter referred to the Chairperson for investigation and report, that a criminal offence may have been committed the matter should be remitted to NIIC. If the NIIC agreed with that view it would take over the investigation of the matter itself where it considered that the nature of the complaint was such that it ought not be considered or investigated internally by the NCA in the first instance. If at any stage the NIIC believed that a criminal offence might have been committed it should then follow the same course as for Category A complaints against the NCA as described above.

7.44 Where a complaint concerns a seconded officer, particularly a State or Territory police officer, or a member of a task force, it would be open to the NIIC to invite the officer's home agency to play some role in the investigation of the complaint. The NCA and the relevant home agencies could enter into memoranda of understanding about this procedure. If the complaint concerned a legal practitioner or a consultant who was a member of a professional body with responsibility for discipline and ethics then the NIIC could invite involvement from that body in the investigation of the complaint.

### **Dealing with Category C complaints (minor)**

7.45 These matters should be suitable for informal resolution by conciliation or mediation. Table A lists the guidelines of the AFP pilot workplace resolution scheme in the ACT and is a starting point for considering the content of the guidelines. The ACT pilot workplace resolution guidelines provide that workplace resolution should be used for:

- complaints relating to acts of incivility such as demeanour, discourtesy, rudeness or abruptness
- complaints relating to misunderstandings of facts or of law that may be resolved by explanation
- complaints based on a misunderstanding of police practices or procedures that may be resolved by explanation

- a complaint made by a person who has an apparent mental dysfunction or is otherwise disturbed or obsessive and, the complaint has either been made before or appears, by its nature, to be without substance and consistent with the complainant's apparent state of mind
- a complaint alleging a less than serious neglect of duty, including loss or misuse of property or equipment, failure to respond promptly or to provide adequate service, and other like matters
- less than serious traffic complaints
- with the approval of the IID, complaints concerning the use of minor force associated with an arrest or other lawful police conduct that may include mere jostling, pushing and shoving in the execution of duty — without any intended features such as intimidation or attempts to obtain a confession — but excludes intentional assaults.<sup>238</sup>

7.46 A major goal of these Category C guidelines would be to ensure that minor complaints are immediately acted upon by supervisors and put on a fast track to a conciliated outcome.

7.47 Minor complaints would not await registration with the NIIC or confirmation by NIIC of a classification as a Category C complaint before informal resolution is commenced.

7.48 The NIIC would promptly receive a record of all Category C complaints including a description of the nature of the complaint and the results of the informal resolution. It would also have power to review the process and outcome but would not as a matter of course conduct any of its own enquiries or investigations into individual complaints in this Category except for routinely contacting complainants to see if they were satisfied with the outcomes. The NIIC would conduct random audits to test the effectiveness and probity of the system.

### ***Submissions***

7.49 ***The role of the AFP and NCA in Category B matters.*** The Attorney-General's Department submitted that in the current climate of managerial responsibility it is appropriate that all but the most serious complaints should be dealt with by the AFP and the NCA, overseen of course by an independent external body.<sup>239</sup>

7.50 The AFP expressed a similar view to the Attorney-General's Department about the nature of its involvement in Category B matters. It did not question the introduction of categories.<sup>240</sup>

7.51 The AFP was concerned, however, that its appointees investigating complaints referred to it by the NIIC would be directly responsible to an external agency effectively taking them out of the control of the AFP Commissioner. It argued that, in the case of investigations referred to the AFP, the Commissioner must have the management and supervision of AFP personnel and responsibility for the conduct of the investigation.

7.52 In a subsequent consultation with the Commission, the AFP Commissioner indicated that the AFP would agree with the external body having control and direction of those investigations concerning serious misconduct or corruption but, for the less serious range of matters, the AFP maintained its preference to retain responsibility and control of its officers in the conduct of any investigation. The AFP argued that this is vital to its managerial responsibility. It submitted that any concerns relating to the thoroughness or integrity of the work could be best addressed by the independent body having contemporaneous oversight and periodic review of investigations. If there were serious concerns that could not be resolved between the Commissioner of Police and the head of the external body the matter should be referred to the Minister.

### ***Commission's views***

7.53 The Commission acknowledges the concerns expressed by the AFP. While there is a need to achieve the appropriate balance between internal and external input, the key to the Commission's approach is that it would be for the NIIC, in consultation wherever appropriate with the AFP or the NCA, to determine the nature of the investigation. It would make that judgement using guidelines that it develops about the necessary level of internal and external input and after considering the circumstances of the particular case.

The Commission believes that it is fundamental to ensuring public confidence in the impartiality of the system that the external agency be given that power of selection. That fundamental need is expanded upon in chapter 9 as is the continuing and ongoing history of difficulties with relying on internal investigations where the external agency has a subordinate role.

7.54 For the most serious complaints and those matters involving serious corruption there appears to be agreement that the external agency should have control and management and full powers of direction. The NIIC would undertake these investigations and any AFP or NCA personnel involved in these matters would be subject to the control and direction of the NIIC for the purposes of that investigation. They would be seconded to the NIIC for the period of their involvement and they would be subject to the NIIC's secrecy provisions. That is, they could not advise the AFP or the NCA about that investigation unless authorised to do so.

7.55 The Commission proposes that, in relation to Category B matters, (as indeed for all matters), the NIIC would have the power and the role to determine the appropriate course of action and the level of external and internal input. For some Category B matters the NIIC might wish to exercise very close management, including, for example, actively managing the investigation including directing AFP and NCA personnel. The NIIC might wish to exercise this control and direction because of the special vulnerability of the complainant or because there is some public concern about the behaviour of the agency in question. In some cases the NIIC might determine that a case raising these issues was so significant that it should be dealt with as a Category A matter on the basis that it raised matters of significant public interest.

7.56 In still other cases the NIIC might refer the matter to the AFP or the NCA for investigation with the only qualification that the AFP or NCA should follow general guidelines and standards. The Commission expects that the majority of Category B matters would be dealt with in that manner. In those cases, while the NIIC could, if necessary, intervene to change the course of the investigation or to issue directives, usually the matter would be under the immediate supervision and control of the AFP or the NCA. The NIIC's role in these cases would essentially be one of quality control and checking at the end of the AFP or NCA investigation. Under the Commission's scheme the NIIC would have the flexibility to determine precisely what was the most appropriate investigation for each particular matter.

7.57 The scheme that the Commission is recommending is the best approach to achieve the objectives of a law enforcement complaints system. It takes into account national and international trends. The Commission believes that it will also work in practice.

7.58 In relation to the proposal that the NIIC have the capacity to control or direct all Category B matters, the Commission notes that the CJC has similar powers of control and direction over the Queensland Police complaints system. The Commission has sought comment from the CJC on its relationship with the Queensland Police Service. The CJC conceded that there has been some reduction in total police managerial responsibility by reason of the CJC having a power of control and direction in relation to complaints and corruption. That is necessary, in the CJC's view, for the effective and impartial working of the system and to ensure public confidence. However, the relationship between the CJC and the police in relation to complaints and corruption investigations had worked well. The CJC has rarely had to give formal directions to the police because the police usually see the benefit of what the CJC is suggesting and because the police know that the CJC does have the ultimate power of direction.

7.59 The CJC provided examples demonstrating that the police did not have control over the prosecution of criminal matters. The DPP usually had carriage of those matters and exercised significant control over the conduct of the prosecution including requesting the police to conduct further investigations or to obtain evidence. The police had accepted that in this area they could not exercise total control and that there had to be an effective relationship with the DPP.

7.60 The CJC also suggested that its policy of seconding police officers worked well. The CJC found that officers felt freed from the cultural pressures of the police service and quickly adapted to a new culture of being dedicated to identifying misconduct and corruption and assisting to remove it from the police service. Secondment with the CJC also provided appropriate rewards for officers who worked well by assisting them in their careers.

7.61 The CJC suggested that in many ways the police were relieved that the CJC was conducting many of the serious investigations into corruption and potential misconduct, for example, a shooting by police. Many of these cases would be extremely stressful for police officers to do themselves because they would be dealing with their own and in some cases with officers whom they knew personally.

7.62 This view of an effective working relationship between the CJC and the Queensland Police has been endorsed by the Bingham inquiry, the Queensland Police Service and the Queensland Police Union of Employees. The Union has advised the Commission that Queensland has the leading complaint and discipline process in Australia which is reasonably well accepted by the Police Service, its members and the public. The President of the Queensland Police Union in 1993 is on record as saying that

[W]hile the Criminal Justice Commission exists it enables us [the union] to say to people who want to make allegations against police, to score points — if you have the evidence, the facility is there to have it investigated, that facility is the CJC.

The union has quite deliberately supported the CJC, quite actively supported it. I have said on a number of occasions that any attempt to dismantle the CJC will be actively and energetically resisted by this union.<sup>241 7</sup>

### ***Other submissions on the categories of complaints and investigation procedures***

7.63 The NCA had no objections in principle to the Commission's proposed classifications, although it submitted that Categories A and B should be confined to serious criminal matters in relation to which a minimum term of imprisonment for a period of at least three years could be imposed.<sup>242</sup> It submitted that the inquisitorial powers of the NIIC should be confined to those categories and not available for the investigation of less serious matters.

7.64 The Victoria Police agreed with the classifications and advised that they generally approximate the current situation and future direction in Victoria.<sup>243</sup>

7.65 The Ombudsman believed that there was a gap between Categories B and C.<sup>244</sup> According to the Ombudsman neither Category includes misconduct which is less than serious misconduct but more than a customer complaint. Examples suggested by the Ombudsman are accessing of information for personal reasons (not involving corruption or the disclosure of the information) and irregularities in preparing or adjudicating upon a search warrant. This type of conduct may result in an official caution or other disciplinary action but it is not at the serious end of the scale. Nor is it generally a customer service matter or necessarily suitable for a managerial response. The Ombudsman suggested that the gap could be filled by deleting 'serious' from the description of category B.

7.66 The Tasmania Police were concerned with the use of categories.<sup>245</sup> If a matter is 'pigeonholed' into a category and treated as such, the serious criminality or corruption may not be detected or the perpetrators may be forewarned by the investigative style. The Tasmania Police also argued that categorisation leads to subjective interpretation of the meaning of words such as serious and minor. The Tasmania Police gave the example of a technical assault which would normally be regarded as a minor complaint but in a particular case caused a serious injury. Which Category should be used?

7.67 The Western Australian Parliamentary Commissioner for Investigations queried the Commission's proposal for the handling of Category C minor complaints on the basis that he considered that it would allow no opportunity for further investigation by the independent agency if the complainant was unhappy with the outcome of the police informal resolution.<sup>246</sup>

### ***Commission's views***

7.68 The Commission does not support the suggestion by the NCA of confining Categories A and B to serious criminal matters of a minimum term of three years. This would misconstrue the purpose of the guidelines. They are not intended to be rigid demarcations, for example, that a matter must exhibit some particular defined characteristics before it can be allocated to a particular category. The guidelines would operate initially as a primary streaming process so that matters received appropriate attention from the outset but there would need to be a capacity for movement after some inquiry into the matter. In any event the Commission would not agree with the NCA's view that Categories A and B should be confined as suggested.

For example, serious disciplinary matters would usually fall within Category B. The Commission would suggest, as a very broad indication, that offences under the *Commonwealth Crimes Act 1914* (Cth) would almost always be regarded as Category A matters.

7.69 The Commission does not consider it appropriate to limit legislatively the NIIC's coercive powers to particular categories because it may be possible that some exercise of these powers is necessary to establish the truth of a matter. It is possible that the use of a coercive power in relation to less serious complaints may also bring forward information of systemic corruption or serious misconduct from what is an apparently minor complaint or a series of minor complaints. In such cases the capacity to use coercive powers may be very useful. Nevertheless the Commission agrees with the NCA that the NIIC should develop guidelines about the use of its coercive powers including how they are ordinarily used for different categories of complaints and should monitor and report on the nature of their use and the frequency. One would expect that it would only be in very exceptional circumstances that the full range of coercive powers would be used for anything but serious complaints.

7.70 The Commission used the term serious misconduct for Category B to emphasise that many matters should be able to be dealt with under informal resolution or by managerial action. The Commission accepts that this middle range of complaints might be better described as 'misconduct' rather than 'serious misconduct'.

7.71 The Tasmania Police's concerns are based on a misconception about the nature and purpose of the classifications. As noted above, they are not intended to be rigid to the extent that no movement is possible. Minor complaints would not be ignored or 'pigeonholed'. The information from those complaints that are dealt with informally would be sent to the NIIC and analysed and correlated. This would in fact be one of the great strengths of having one agency handling complaints and corruption. It would readily allow information from all complaints to be centralised and used to look for information about corruption or risks of corruption.

7.72 The Tasmania Police mention as an example of problems that categorisation can cause technical assault causing serious harm. While the Commission regards this as a highly unlikely occurrence the Commission believes that the result would be fairly clear. The matter, would under the Commission's proposals, be regarded as one not to be resolved informally because of the serious consequences that flowed to the complainant. The first question that would be asked is how could a technical assault cause such serious injury? That would seem to require some degree of investigation. If the law enforcement officers involved, including probably by necessity the supervising officer making decisions about the streaming of the complaint, tried to manipulate the categorisation to avoid any external investigation into the matter, which in itself would be an unlikely event, the nature and circumstances of the complaint would be sent to the NIIC for audit and the response of the complainant to the process would be ascertained. An attempt to manipulate the system in this way, for example, by not describing the true nature of the complainant's injuries would be a difficult and potentially a very serious matter for those involved.

7.73 In the DRP the Commission commented that the NIIC would rarely conduct any of its own inquiries or investigations into Category C complaints. This was not intended to mean that a complainant could not request that an investigation be undertaken. The NIIC would contact each complainant as a matter of routine to determine whether the complainant was satisfied with the informal resolution. In addition if a complainant did not want the complaint to be dealt with informally he or she would not be compelled to participate and this decision by the complainant would be required to be conveyed to the NIIC.

7.74 However, the Commission considers that with an effective informal resolution system, many complainants will be satisfied and will not seek a full investigation. In those cases where they do, it will be a matter for assessment by the NIIC as to the level of any inquiry, if any, that should be carried out. This approach is in accord with the current approach to informal resolution.

### **Recommendation 39 — Categories and guidelines**

The NIIC should issue guidelines about investigative procedures for different categories of complaints. The Commission considers that the main categories should be

- Category A — serious criminality, corruption and significant public interest
- Category B — misconduct
- Category C — customer service matters
- Category D — internal management matters.

#### **Recommendation 40 — Investigative procedures**

The NIIC should have different investigative procedures depending on the category of the matter.

##### ***(i) Category A for the AFP***

For Category A complaints involving the AFP the NIIC should investigate the matter itself with the power to request that the AFP provide personnel and/or facilities and equipment.

##### ***(ii) Category A for the NCA***

For Category A complaints involving the NCA the NIIC should investigate the matter itself with the power to request that the NCA provide personnel and/or facilities and equipment. Where it appears to the NIIC that a complaint against the NCA or a staff member is a Category A complaint that goes *beyond the conduct of AFP* seconded personnel, the NIIC would consult with any State or Territory agency whose staff were involved as to the appropriate course of action including the matter's investigation.

Preferably the NIIC and all relevant State and Territory agencies should develop memoranda of understanding on the process of investigation of complaints involving the NCA and seconded staff, consultants or joint task force members.

One option that should be available and specified in the legislation would be the establishment by the NIIC of an Investigatory Board to assist it in investigating the complaint or aspects of the complaint. The legislation should not prescribe the composition of any Board. This would be a matter for the NIIC and the relevant agencies to determine in the particular circumstances.

##### ***(iii) Category B for the AFP***

For Category B complaints involving the AFP the NIIC would

- require the AFP Commissioner to conduct an internal investigation with no use of the NIIC's coercive powers but subject to the management or supervision of the NIIC, or
- establish a joint investigation with the AFP and, where appropriate, including members of other Commonwealth or State agencies, particularly law enforcement agencies — these investigations would be subject to the appropriate level of either management or oversight by the NIIC and where necessary the NIIC could use its coercive powers, or
- investigate the matter directly itself (with its full range of coercive powers available) where it considered that the nature of the complaint was such that it ought to conduct the entire investigation by itself — this would be the only option available if the complaint concerned the Commissioner of the AFP or a Deputy Commissioner, or
- refer a complaint that concerns the AFP generally to the Commissioner of the AFP for consideration and response.

##### ***(iv) Category B for the NCA***

For Category B complaints involving the NCA the NIIC would

- refer a complaint about the actions of a staff member to the Chairperson of the NCA for investigation and report with no use of the NIIC's coercive powers but subject to the management or supervision of the NIIC, or
- conduct the investigation but with involvement from the NCA and, where appropriate, members of other Commonwealth or State agencies, particularly law enforcement agencies — these investigations would be subject to the appropriate level of either management or oversight by the NIIC and where necessary the NIIC could use its

- coercive powers, or
- investigate the matter directly itself (with its full range of coercive powers available) where it considers that the nature of the complaint is such that it ought not be investigated internally by the NCA in the first instance — this would be the only option available if the complaint concerned the Chairperson of the NCA or a member, or
- refer a complaint that concerns the NCA generally to the Chairperson of the NCA for consideration and response

**(v) Categories C and D**

Category C complaints (customer service) would be dealt with by informal resolution provided by the AFP or the NCA. The NIIC would be advised of all such complaints and their resolution and have powers of review and audit.

Category D complaints (internal management matters) would, if they came to the attention of the NIIC, be referred back to management for appropriate action. The NIIC would be able to review any decision taken by management.

## **Resolving any major conflicts**

7.75 The AFP also expressed concern about possible conflicts between the AFP and the external body about competing demands and priorities. For example, there might be a dispute about the relative importance between an internal investigation and a wider serious criminal investigation. The AFP wanted provision to be made for dealing with potential conflicts.

7.76 The AFP has argued that there needs to be provision in developing the role of the external body to reduce the risk of major AFP operations being compromised or interfered with inadvertently by the external body. This could arise where, for example, the agencies were unaware of each other's involvement or where an AFP appointee was suspected of corrupt activities with operational targets. The AFP asserted that it would be essential to have clear lines of authority and accountability between the Commissioner and the external agency.

7.77 The Commission acknowledges these concerns of the AFP. It has consulted with the CJC on its experience in relation to this issue of potential conflict between the police and the external agency.

7.78 The advice of the CJC suggests that in practice conflicts between the CJC and the police are rare in relation to complaints and corruption investigations. There had been no conflicts arising about CJC investigations into corruption or misconduct interfering with police operations. This was because the CJC took into account the police's normal operations. For example, if the CJC had a suspicion that an officer involved in a particular police operation was corrupt it would not blow the whistle and stop the operation. It would let it run, if necessary, with covert surveillance of the officer, and see what happened because that was one way of establishing whether the officer was corrupt.

7.79 While the Commission is of the view that the scope for significant conflict of this kind between the AFP, the NCA and the NIIC would be very limited, the Commission considers that it would be prudent to establish a procedure for ensuring that any conflicts can be monitored and to enable the Attorney-General to review such conflict and take any action that might be warranted. The Commission considers that this procedure would only be invoked in very exceptional cases.

7.80 The NIIC legislation should provide that the Commissioner of the AFP or the Chairperson of the NCA may serve on the Chairperson of the NIIC a certificate to the effect that the Commissioner or Chairperson (as the case may be) is satisfied that a course of action contemplated or being undertaken by the NIIC would seriously prejudice, or is prejudicing, an operation of the AFP or NCA and that appropriate consultation with the NIIC has not resolved this concern.

7.81 The legislation should provide that where the Commissioner or the NCA Chairperson issues such a certificate, the Chairperson of the NIIC shall not undertake or continue the relevant action unless satisfied that the need for action outweighs the concerns of the AFP Commissioner or NCA Chairperson.

7.82 The Chairperson of the NIIC would be required to report the service of such a certificate immediately to the Attorney-General and to report on the issue of any certificates, and the responses of the NIIC to those certificates generally, in each NIIC Annual Report subject to privacy considerations and operational security requirements.

#### **Recommendation 41 — Resolving major conflicts**

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

The legislation should also provide that, where the Commissioner or the Chairperson issues such a certificate, the Chairperson of the NIIC shall not undertake the relevant action or continue it unless satisfied that the need for action outweighs the concerns of the AFP Commissioner or NCA Chairperson.

The Chairperson of the NIIC would be required to report the service of a certificate immediately to the Attorney-General and report on the issue of any certificates, and the response of the NIIC to those certificates, in each NIIC Annual Report, subject to privacy considerations and operational security requirements.

### **Time limits**

7.83 The NIIC promulgated guidelines would prescribe strict time limits to be complied with and reporting processes to the NIIC to be followed. The DRP proposed that a complaint should be recorded immediately it is received and the complainant should be contacted within 24 hours of the receipt of the complaint. If informal resolution was appropriate it should be completed within 14 days.<sup>247</sup> If mediation was used it should be completed and reported on within 30 days. Preliminary enquiries and a report should be available within 30 days and full investigations must be completed and reported on within 90 days.<sup>248</sup>

7.84 A failure to comply with a time limit should be reported to the NIIC within 24 hours of that failure unless the NIIC had granted an extension of time. The NIIC would provide comment in its reports to Parliament on failures to meet time limits.

7.85 *Submissions.* The Victoria Police and the Ombudsman supported the introduction of time limits.<sup>249</sup> The Victoria Police stressed that they should not be prescribed in legislation. The Commission does not intend that the time limits themselves should be prescribed in legislation which would only provide that the NIIC may issue guidelines about the time to be taken to deal with complaints and any other processes provided for under the legislation.

#### **Recommendation 42 — Time limits**

There should be time limits for action in relation to complaints. These would be set out in guidelines issued by the NIIC.

### **Role of the IID**

#### *Amalgamation of IID and ISA*

7.86 The DRP proposed that IID and ISA should be amalgamated to form a new IID. In chapter 2 of this report the deficiencies of the current demarcation between them in relation to the AFP's complaints system were discussed.

7.87 **Submissions.** The AFP submitted that the Commissioner must have the flexibility to structure the organisation to meet the emerging and changing needs and priorities of the organisation.<sup>250</sup> The Commission assumes that the AFP is suggesting that the Commissioner should make such decisions about amalgamations.

7.88 The Victoria Police were of the view that, given the concerns expressed in the DRP, it would seem appropriate to amalgamate the two AFP units.<sup>251</sup> The submission added that this was consistent with the new approach in Victoria where it is intended to move the corresponding Internal Investigation Unit and Internal Security Unit into joint accommodation where skills and resources may be pooled and more efficiently used. However, the essential expertise necessary to conduct investigations into what may require different approaches, that is complaint investigation and corruption investigation, would still be retained.

7.89 **Commission's views.** The Commission considers that there are valuable efficiencies to be gained by amalgamating the investigative aspects of the IID and ISA. It may be that within that merged entity it will be useful to have teams that focus on complaints and others that focus on corruption. The NIIC would also play a role in assisting the AFP in determining its IID staffing levels and in the selection, training and deployment of internal investigators.

### ***The role of the IID***

7.90 The Commission considers that the objectives of the IID should be set out in the complaints legislation. This would encourage efficient and effective investigations and better co-operation and interaction with the NIIC. The IID should also have an educative function to ensure the good discipline and proper functioning of the AFP. The Commission considers the following as appropriate objectives:

- to ensure that the AFP is honest and maintains public confidence by diligent investigation of complaints and matters relating to corruption
- to promote AFP professionalism (including an educative function)<sup>252</sup> and help to ensure AFP accountability<sup>253</sup>
- to provide effective, efficient and impartial investigation of complaints and matters of corruption
- to assist in reforming AFP practices and procedures.

7.91 Specific functions and procedures should be set out in guidelines and procedures after appropriate consultation with the NIIC. This could include general procedures concerning the conduct and method of the investigation: for example, to ensure that police collusion is minimised by having broadly contemporaneous interviews (and keeping members separate until all interviews are completed)<sup>254</sup> and to provide for other investigative requirements such as the taping of all interviews.<sup>255</sup> The NIIC would also be able to issue guidelines and standards for the conduct of investigations both generally and in a specific case.

7.92 It should be open to the AFP in consultation with, or at the direction of, the NIIC, to use in relation to complaints or corruption matters AFP personnel who are not members of the IID. That is, there would be no statutory requirement that only the IID could be involved in these investigations. This recognises that there may be occasions where it would be more appropriate to use all or some non-IID personnel. This might be because of resource demands or because personnel outside of the IID have particular experience or skills that may be useful for a particular investigation.

### ***Promoting the role and quality of the IID***

7.93 The AFP has submitted that currently the IID is considered by AFP appointees to be a prestigious area and that it is staffed by personnel of wide experience and integrity.<sup>256</sup> The Commission considers that it is imperative for the AFP to continue to improve the calibre, training and status of the IID. This could involve greater training in investigation techniques and ethics, and policies that further encourage AFP appointees to see the IID as a prestigious and valuable arm of the AFP. A period of service in the IID should be regarded as a valuable step for promotion to senior positions in the AFP.

**Recommendation 43 — Role of the IID**

The IID and ISA should be amalgamated to form a new IID.

**Recommendation 44**

The objectives of the IID should be provided for in the complaints legislation.

**Recommendation 45**

There should be no statutory requirement that only the IID can be involved in, or conduct, complaints or corruption investigations concerning the AFP. This recognises that there may be occasions where it would be more appropriate to use all or some non-IID personnel.

**Recommendation 46**

The AFP should continue to improve the calibre, training and status of the IID.

# 8. Responses to the NIIC

## Introduction

8.1 This chapter discusses the responses to the proposal in the DRP that a National Integrity and Investigations Commission (NIIC) be established as a single agency to deal with complaints and corruption involving the AFP and the NCA. Some responses strongly supported an NIIC while others were opposed. As there was a considerable difference of view the Commission has dealt with the arguments in detail.

8.2 There was general agreement across this divergence of views that as a matter of principle both the AFP and the NCA needed effective external scrutiny in relation to complaints and corruption investigations. This principle was only questioned by the Australian Federal Police Association (AFPA) and one of the Commission's consultants. Both these views are dealt with in this chapter.

## *Main issues*

8.3 The responses to the NIIC highlighted the following major issues

- is there a need for an external corruption body for the AFP and the NCA?
- should there be a single complaints and corruption agency or should the Ombudsman still have a role, and if so, what role?
- are the benefits of the NIIC outweighed by its potential threat to the civil liberties of those who may be investigated or subjected to its royal commission powers?
- which is the most cost effective option?

## *Summary of responses*

8.4 The Australian Council for Civil Liberties,<sup>257</sup> the Law Council of Australia<sup>258</sup> and the Queensland Law Society<sup>259</sup> all supported a NIIC approach. Individuals who made submissions also supported the NIIC approach. One expressed the view that the CJC model is the most successful investigative authority in Australia. This submission emphasised the difficulties of investigating and detecting corrupt police who close ranks.<sup>260</sup>

8.5 The Inspector-General of Intelligence and Security fully supported the establishment of the NIIC as proposed in the DRP as the most appropriate way of dealing with complaints, corruption and integrity issues for both the AFP and the NCA.<sup>261</sup>

8.6 The Victoria Police supported the establishment of the NIIC but subject to some qualifications.<sup>262</sup> It argued that the establishment of the Victorian Office of Deputy Ombudsman (Police Complaints) in 1986 had met the criteria for an effective complaints system. It agreed with the Commission's approach that it was vital to the integrity of any complaints system for an independent, external agency to have a focused and exclusive responsibility for the review of all police investigations into such complaints. The body must also possess the capacity, competence and resources to undertake its own investigations when the need arises.

8.7 The AFP supported the presence of an effective external investigator of complaints and corruption but did not express any preference on the establishment of the NIIC.<sup>263</sup>

8.8 The NCA was opposed to the NIIC dealing with NCA complaints and corruption matters.<sup>264</sup> Its arguments are dealt with in chapter 5 on the NCA. The Ombudsman,<sup>265</sup> the Western Australian Parliamentary Commissioner<sup>266</sup> and the Tasmania Police<sup>267</sup> asserted that an enhanced role for the Ombudsman would be a more cost effective response. The Australian Federal Police Association (AFPA) opposed the NIIC because it believed that a specialist external corruption body would reduce the managerial responsibility of the AFP and the NCA to promote integrity.<sup>268</sup>

## The need for an external corruption body

### *The DRP proposal*

8.9 The Commission proposed that the NIIC should have a dedicated anti-corruption division which is devoted to detecting and investigating corruption within the AFP and the NCA. That is, it must have a substantial pro-active stance. It should have the power to audit or review any AFP or NCA office and to gain full access to information. The anti-corruption division should be established by the NIIC Act and its charter should be to detect and investigate corruption. It should act to discover corruption, potential corruption or likely avenues for the development of corruption. This work would be done in conjunction with the AFP particularly with the IID and its Audit and Security branch and also with the NCA. Risk management strategies would be developed to identify, change or monitor high risk corruption areas, personnel and processes.

### *The AFP submission*

8.10 The AFP did not comment on whether the NIIC should be established or not as that question went to the structure for handling complaints which it believed is a secondary consideration to having a proper and accountable process. The AFP submitted that there is a need to ensure that there is external oversight of complaints and anti-corruption investigations by a suitably empowered external body.<sup>269</sup> The AFP argued that with the probable exception of corruption and serious malpractice the existing system was fundamentally sound. It asserted that if the powers under the Complaints Act were expanded and fully utilised the major deficiencies identified in the Commission's DRP would be overcome.

8.11 The AFP's view was that if the investigation of serious malpractice in all its forms is to be effective the external action must be able to be independent, expeditious, covert and proactive, as well as being on occasions public and coercive. According to the AFP the role of the external body will need to embrace:

- the investigation of corruption and serious malpractice issues
- joint oversight/investigation and advice on other serious complaints
- review of internal investigations and
- monitoring and oversighting (including the power to review and audit) managerial and conciliation matters.

8.12 **Commission's response.** The AFP has acknowledged that a major weakness of the current system is the lack of an external body that can effectively conduct investigations into corruption and serious malpractice. In the Commission's view the AFP's submission inevitably leads to the conclusion that the Ombudsman's office could not carry out all of the necessary functions of the external body. The Ombudsman's office is not an appropriate body to undertake the investigation of corruption and serious malpractice. They are areas that may involve surveillance and other covert action. The Commission's submissions and consultations support that view as does the work and recommendations of the NSW Royal Commission. This argument is further discussed at paragraph 8.44 and in detail in chapter 9.

### *The AFPA submission*

8.13 The AFPA opposed a specialist external corruption body because it would reduce the managerial responsibility of the AFP and the NCA to promote integrity.<sup>270</sup> The AFPA argued that to shift the responsibility to an outside body would 'promote the adversary culture' that exists in New South Wales and Queensland following the establishment of the NSW ICAC and the Queensland CJC. It added that the respective police services in those States formed a defensive barrier to those bodies and that they have been decidedly unsuccessful in combatting corruption as the NSW Royal Commission has demonstrated.

8.14 **Commission's response.** The AFPA view is at odds with the AFP submission because the latter acknowledges that for serious misconduct and corruption there must be an effective external body with the

power and capacity to conduct investigations. The NSW Royal Commission made no reference to any 'adversary culture' affecting the performance or the capacity of the ICAC or the CJC. The Royal Commission's views on the performance of the ICAC are discussed below. The NSW Royal Commission recommended that a new external anti-corruption body, the Police Integrity Commission, be established to conduct external investigations of corruption in the NSW Police Service. The Commission is unable to see how the NSW Royal Commission's work lends any support to the assertions of the AFPA. In fact its work supports the opposite conclusion, that is, that an effective external anti-corruption body is essential.

8.15 There is no evidence available that the CJC has been 'decidedly unsuccessful in combatting corruption'. To the contrary, the Bingham inquiry, the Queensland Police Service and the Queensland Police Union have each endorsed the work of the CJC in the area of complaints and corruption.

8.16 Under the Commission's recommendations for the NIIC, the AFP and the NCA would still play a major role in investigating complaints but that role would be at the formal request of the NIIC. The NIIC would assist the management of the AFP and the NCA by improving the public credibility of the agencies and allowing them to spend more time on their operations to prevent and detect crime. The NIIC would be independent from the AFP and the NCA but there would be useful engagement and co-operation between them. These views are supported by the Bingham report in relation to the interaction between the Queensland Police Service and the CJC. The relationship between the NIIC and the AFP and NCA is further discussed in chapter 7.

8.17 It should also be borne in mind that the Commission is recommending an increased managerial role for the AFP and the NCA in disciplinary matters.

### ***Ombudsman's submission***

8.18 The Ombudsman stated that it is a matter for the Government to consider whether a permanent anti-corruption body is necessary.<sup>271</sup> According to the Ombudsman where a complaint involving alleged corruption or criminality comes to her office's attention her 'usual practice' is to arrange with the AFP for it to be investigated by ISA under the Ombudsman's supervision and reporting to the Ombudsman.

8.19 The Ombudsman's proposal for an enhanced role for her office includes the capacity for joint operations with the AFP or other law enforcement bodies on matters involving corruption or criminal activities. She suggested that her office could monitor the AFP's anti-corruption efforts in addition to conducting joint investigations in appropriate cases and with a capacity for independent investigation of some corruption allegations. In some circumstances it might be necessary to establish a completely independent inquiry where the investigation goes beyond the capacity of the Ombudsman and ISA. The Ombudsman argued that such an approach would cost far less than establishing a permanent anti-corruption body. She also argued that the existence of a permanent anti-corruption body is no guarantee that a one-off inquiry would not be necessary from time to time as with NSW where the current Royal Commission was necessary despite the existence of the Independent Commission Against Corruption since 1989.

### **Commission's views**

8.20 The primary argument of the Commission is that the Ombudsman should have no role at all in AFP and NCA complaints and corruption matters other than as constituting one point for lodging complaints.

### ***Ombudsman unsuitable for law enforcement complaints and corruption role***

8.21 The Commission considers that an Ombudsman's office is fundamentally unsuitable for the role of handling law enforcement complaints and corruption. The accepted and traditional role of an Ombudsman is to review defective public administration. The current Ombudsman has herself identified what this role is in her most recent Annual Report which notes that many of the complaints the Ombudsman deals with are about

- complex, ambiguous or incomplete information that is not appropriate to the individual circumstance

- wrong and inaccurate information
- problems in navigating the complexity of government systems
- failure to respond to requests or to provide reasons for decisions
- undue delay in decisions
- unfairness of policy
- conflict of interest and/or wrongful use of statutory powers

8.22 The Report added that most of these complaints are about 'quality of service' and they often involve the reasonableness or lawfulness of agencies' actions. Typical complaints concern the payment or non-payment of entitlements from the Department of Social Security, the Department of Employment, Education, Training and Youth Affairs, the Child Support Agency and the Australian Taxation Office. Other complaints, for example, concern compensation for lost or damaged mail from Australia Post.

8.23 The Commission has the view that the investigation of law enforcement complaints is a significantly different task that requires special skills and a special approach. This is not a new idea. It was suggested by the Senate Standing Committee's 1991 report on the role of the Commonwealth Ombudsman and it has been endorsed by a former Commonwealth Ombudsman who is an acknowledged expert on public law and the role of an Ombudsman.

***Senate Standing Committee's 1991 report***

8.24 The report made the following comments

The police complaints area is the most difficult of the Ombudsman's responsibilities. The nature of the complaints differs substantially from most others received by the Ombudsman. Many police complaints involve allegations of criminal behaviour by the persons complained against. Most involve claims of betrayal of trust by officers in a special position of power. In many of them there are no independent witnesses ... the type of investigation required is qualitatively different from that required in the bulk of the Ombudsman's work.<sup>272</sup>

8.25 The Committee found considerable public disquiet about the effectiveness of the AFP complaints system.<sup>273</sup> Most of the evidence put to it was critical of the delays, the almost total absence of direct investigation by the Ombudsman and the large number of complaints found to be incapable of determination. The Committee also believed that most cases requiring direct investigation and involving the possibility of criminal charges or other serious sanctions would be better investigated by an agency other than the Ombudsman.<sup>274</sup> However, the Committee argued that practical considerations meant that this was not feasible.

8.26 The Committee recommended that unless adequate resources were made available for active investigation by the Ombudsman of a sufficient sample of AFP complaints during 1992 and subsequent years and for a substantial reduction in delays currently experienced in review of IID files, the role of investigating complaints against the police should be removed from the Ombudsman's jurisdiction.

8.27 It is the Commission's view that those criteria have not been met since the Senate Standing Committee's report. The Commission's consultations, submissions received and research suggest that the situation has not greatly changed since 1991. What has significantly changed is the increasing demand for greater accountability and integrity by law enforcement agencies. The public pressure for a fundamental improvement in the accountability of its law enforcement agencies is now undeniable. In addition there is now much greater information available about alternatives to the current Ombudsman model than was available in 1991.

### *Views of a former Commonwealth Ombudsman*

8.28 Professor Dennis Pearce, a former Commonwealth Ombudsman, has supported the removal of the Commonwealth Ombudsman from the AFP complaints system and the establishment of a separate office that has its own investigators.<sup>275</sup> Professor Pearce expressed the view that the fundamental question was whether dealing with police complaints was a suitable role for an Ombudsman's office. In his view it was not. Issues about resources and dealing with routine complaints as opposed to corruption matters were subsidiary to that fundamental issue.

8.29 Professor Pearce noted that the Ombudsman's performance in handling police complaints was the subject of significant concern and criticism. He said public concerns have been expressed about delay and there is a widespread view that the Ombudsman's intervention has little impact on the AFP. Professor Pearce said that the improvement in the performance of the Ombudsman since the Senate Committee report in 1991 was 'marginal'.

8.30 According to Professor Pearce the Ombudsman was an inappropriate agency in this area. He said that the Commonwealth Ombudsman's office does not have a separate team of investigators skilled in the type of investigation that police complaints usually entail. Nor can it engage in surveillance or telephone tapping which are essential if more serious allegations are made. He argued that the outcomes of the various inquiries into police corruption in the various jurisdictions of Australia have demonstrated all too clearly what an underpowered office such as that of an Ombudsman is up against when dealing with major allegations of misbehaviour.

8.31 ***Views of the Inspector-General of Intelligence and Security.*** The Inspector-General of Intelligence and Security (IGIS) argued that improved complaint handling procedures go hand-in-hand with efforts to encourage and promote high ethical standards and the fight against corruption.<sup>276</sup> The IGIS submitted that in order for the AFP and the NCA to enjoy continuing public confidence, it is imperative that these tasks are pursued with both clarity of purpose and appropriate vigour. The IGIS thought that both his office and the Ombudsman would be inappropriate.

8.32 The *raison d'être* of the IGIS would be compromised if the complaints handling and anti-corruption functions for the AFP and the NCA were grafted on to his office. There are some very important differences between complaint handling and oversight relating to the law enforcement agencies and the intelligence and security agencies. Law enforcement complaints require a close knowledge of the unique cultures, practices and *modus operandi* of policing in Australia. The sources of information and their handling in this area create particular challenges and a special expertise which is largely unrelated to the knowledge and background required to ensure that the intelligence agencies conduct their activities legally and with propriety. The IGIS concluded that it would be inappropriate to vest a small office like his with two quite distinct functions. In fact the IGIS saw advantages in his position not having judicial or policing experience. In other words, not only would the IGIS be inappropriate to handle the AFP and NCA, it would also have deleterious effects on the IGIS's current jurisdiction

8.33 In relation to the Ombudsman, the IGIS thought it would be a mistake to divorce the handling of day to day police complaints which the Ombudsman would be able to handle from the important task of fighting internal corruption and promoting high standards of integrity and ethical conduct. He argued that given the sensitive police intelligence that needs to be collected and considered in the fight against corruption, the head of this function would need to have close links and ready access to the Executive. This would be imperative in fulfilling the role of assisting Ministers in exercising their control of the AFP and NCA. The Ombudsman has made it clear that she does not want this function and in any event it would not sit well with the Ombudsman's traditional role because the Ombudsman is generally viewed as being outside the administrative apparatus of the Executive.

8.34 In instances which could be viewed as central to the public accountability of Ministers, that is, where there is *prima facie* evidence of serious corruption or criminality within the AFP or NCA, the Ombudsman, because of her primary orientation as a defender of citizen's rights, would be torn between two principles, one of providing support to the Attorney-General and, in her more traditional responsibilities, the other of seeking to redress the detriment incurred by the complainant.

### *Commission's consultations*

8.35 The Commission's consultations supported the view that the Ombudsman was unsuitable for the task of investigating criminal conduct and corruption. Senior AFP officers in Melbourne generally did not consider that the Ombudsman would have the expertise or the resources to investigate matters raising serious criminality.<sup>277</sup> Staff of the Western Australian Parliamentary Commissioner's Office consulted by the Commission expressed the view that the investigation of matters raising serious police corruption was not compatible with the role of an Ombudsman and that few Ombudsmen would have the resources or the expertise to deal with these matters. A specialist external body was necessary for these matters. AFP officers in Tasmania also generally supported the introduction of a specialist national body to investigate serious police complaints and corruption.<sup>278</sup> It was acknowledged that having external investigators improved public credibility and the independence of the investigation.

8.36 Senior Tasmanian police consulted by the Commission said that there was a need for an agency with sufficient powers, that is, royal commission powers to review or investigate serious police misconduct. It would need intelligence and surveillance powers and the capacity to use them together with a power of contempt.

### *Ombudsman's stretched resources*

8.37 The Queensland Law Society expressed reservations about the Commonwealth Ombudsman continuing to have a role in law enforcement complaints.<sup>279</sup> The Law Society was concerned about the very wide spread of the Ombudsman's jurisdiction over a significant range of government departments. It was doubtful that the Ombudsman could any longer be capable of monitoring and dealing with complaints against the AFP. Moreover, according to the Law Society, the Ombudsman's office has not been sufficiently resourced, either monetarily or as to its powers, to continue to deal effectively with complaints against the AFP.

8.38 The Law Society noted that the Commonwealth Ombudsman in her 1995 Annual Report commented that she was dealing with complaints in relation to the Australian Taxation Office, ATSIC and the treatment of illegal immigrants. The Ombudsman has also been given jurisdiction to deal with the very serious complaints that are expected to come from the *National Witness Protection Act 1995* (Cth). In fact that will be the only avenue of redress because that Act specifically excludes any form of judicial review. The Law Society understood that the Ombudsman was to receive no additional funding for this task. This was a recent example of how thinly the Ombudsman's resources were being spread. Moreover, the Law Society added, in the current climate where there have been serious allegations made against AFP officers in the NSW Royal Commission and within the media, the Ombudsman was no longer the most appropriate body.

8.39 The Ombudsman's submission in response to the argument that her resources are being spread too thinly advised that there is already a precedent for quarantining resources to particular parts of the Ombudsman's jurisdiction, for example, the taxation jurisdiction. She argued that this approach, if used for an enhanced police role, would ensure that resources provided for the purpose were not used for other functions.

8.40 *Commission's views.* The Ombudsman has acknowledged the importance of her AFP complaints role. She has also acknowledged that the current AFP complaints system is significantly defective. Moreover, the Ombudsman does not deny in her submission the assertion that her resources have been spread too thinly. Given those acknowledgments the Commission finds it surprising that it has taken until now, when the Ombudsman's continuing role in the system is raised again as an issue as it was five years ago, for the Ombudsman's office to consider a more effective method of ensuring appropriate funding for a key aspect of her jurisdiction.

8.41 The Ombudsman's most recent Annual Report indicates that this inadequate, thinly stretched resourcing is likely to worsen. The Report notes that in 1995-96 the Ombudsman handled 21749 complaints and another 21118 inquiries. This represents a 28% increase in complaints over the previous year. Moreover, the Ombudsman is seeking a broadening of her jurisdiction to allow the investigation of complaints about core government services being provided indirectly by contractors.<sup>280</sup> This broadening of role is sought in the face of reductions to her existing budget. All of these factors lead to the conclusion that the Ombudsman's response to law enforcement complaints is likely to continue to be inadequate with the real potential for it to worsen.

8.42 The Commission would also add that it does not believe that a quarantining of resources would be in any way an adequate response to the record of unsatisfactory performance. Nor could it affect the primary argument that the Ombudsman is unsuitable for the law enforcement complaints role.

### *Issues arising from the NSW Royal Commission*

8.43 The Ombudsman has attempted to use the example of the findings of the NSW Royal Commission into Police to support her argument for an enhanced role for her office in relation to AFP and NCA corruption matters. In the Commission's view this misrepresents what the Royal Commission argued and recommended.

8.44 The NSW Royal Commission did recommend a permanent anti-corruption body for the NSW Police Service, the PIC. It did not recommend an enhanced role for the NSW Ombudsman such as the Commonwealth Ombudsman is suggesting as an option in relation to the AFP and the NCA.

8.45 The Royal Commission in fact made the following observations about the role of the NSW Ombudsman. It stated that the majority of submissions to it had supported the past performance of the Ombudsman, as an independent office which enjoys the confidence of the general public, and provides a forum not elsewhere available for dealing with complaints of misconduct and customer service. The Royal Commission then went on to say that the Ombudsman's performance of its police complaint functions was heavily dependent upon the information received from the Police Service. It added

[T]he Ombudsman lacks the power to deploy coercive powers or to undertake proactive investigations of the kind required for fighting corruption. Findings made are recommendatory in nature, and for it to adopt a role involving direct participation in criminal investigations and prosecutions would subvert its overall function as a supervisory body.<sup>281</sup>

8.46 This view directly refutes the type of role that the Commonwealth Ombudsman is suggesting for her office in relation to the AFP and the NCA.

8.47 As noted above, the NSW Royal Commission also found majority support for the role of the NSW Ombudsman. The Commission from its consultations and submissions in this inquiry cannot draw the same conclusion in relation to the Commonwealth Ombudsman's performance in this area. In fact the overwhelming response has been negative and critical of the Ombudsman's role. While some have said that the Ombudsman has been hampered by lack of resources and powers, there has been little endorsement of the Ombudsman's performance.

8.48 It is certainly true that the NSW Royal Commission was critical of the performance of the ICAC. However, there are two crucial points to bear in mind for the purposes of this inquiry.

8.49 First, the Commission in this report is not proposing a body with the broad range of activities of the ICAC which has responsibility for corruption investigation, prevention and education throughout the whole of the NSW public sector. The NIIC would be limited to the law enforcement activities of the AFP and the NCA with a potential to examine other federal law enforcement activities.

8.50 The second point is that the NSW Royal Commission has identified specific tactical decisions by the ICAC to explain its apparent ineffectiveness in dealing with police corruption. The Royal Commission stated that the ICAC had missed opportunities to investigate police corruption such as with operation Milloo. In other words, the failure was due to decisions about priorities by the ICAC and not because of some systemic difficulty in having a permanent anti-corruption body.

8.51 The Ombudsman has suggested that a permanent anti-corruption body is no guarantee that specific wide ranging Royal Commission inquiries such as the NSW Royal Commission will not be necessary. The Commission would agree that it is no guarantee. However, in the Commission's view the existence of a permanent body with a specific focus and appropriate powers, staff and resources is one crucial element in significantly lowering the need for wide ranging expensive Royal Commissions and inquiries that must try to build up a profile of the agency and ensure that it has staff who are experienced in the area.

8.52 A permanent body can also take a pro-active stance and help to prevent misconduct and corruption or to stop them before they become entrenched or endemic. One-off Royal Commissions or inquiries are necessarily reactive and are often called when a major crisis or problem is suspected or seen to exist. It can be likened to putting out the fire when it is blazing instead of preventing it in the first place. There are also likely to be significant delays before a special inquiry can get under way. This can forewarn corrupt officers and also deaden and taint the evidentiary trail. Moreover, the cost of running wide ranging Royal Commissions is usually extremely high. For example, the NSW Royal Commission has cost \$27 million in direct costs, excluding legal aid.

8.53 There are other significant defects in the Ombudsman's arguments. In her submission she has suggested that her office could be more actively engaged in corruption investigations. The Commission finds some difficulty with the internal consistency of this suggestion with the Ombudsman's other major argument that corruption and complaints are fundamentally different and should not be dealt with by the same body. It would also seem to follow from the Ombudsman's argument that the AFP and the NCA themselves should not have any role in investigating both complaints and corruption in relation to their respective agencies or in the general community. It is difficult to avoid the conclusion that what the Ombudsman actually believes is that it is preferable to have the one external body involved provided that her office is that body.

### ***Need for an external anti-corruption body for the AFP and the NCA***

8.54 In summary an external anti-corruption body for the AFP and the NCA is needed for the following reasons. The overwhelming weight of evidence is that the crucial objectives of a complaints and corruption investigations system, and particularly public confidence, will not be achieved by a reliance on the agencies' own internal measures and investigations. Survey evidence, academic studies and commentaries, and a succession of royal commissions and inquiries show that relying on law enforcement internal investigations will neither actually achieve high levels of accountability and integrity nor satisfy the public that these objectives are being met. A focused and active external investigator is necessary.

8.55 This viewpoint is being increasingly accepted around the world. The President of the International Association for Civilian Oversight of Law Enforcement (IACOLE) advised the Commission that

a true external oversight body, with independent investigative abilities, is a cornerstone of professional policing. Such models give citizens the most confidence in their public officials to ensure that their most basic rights, the preservation of human rights, dignity and freedom are protected. I also believe that such models are effective deterrents against police misconduct. While statistically measuring such theories are impossible, the very existence of such oversight must be viewed by corrupt police as the most effective tool available in a democratic society.<sup>282</sup>

8.56 Mr David Landa, a former NSW Ombudsman acknowledged that an agency with a focus on police corruption was necessary:

[B]odies such as the Ombudsman, ICAC and the NSW Crime Authority are simply 'the flea on the rump on the elephant'. They are only a minor irritation to wayward police. The scattered resources and skills of these oversight bodies are no match for the seriously corrupt. They are at best capable only of surface issues. NSW needs to consider a different approach.<sup>283</sup>

8.57 The NSW Royal Commission into the Police has advised the Commission that 15 former or serving AFP officers have been adversely named in evidence before the Royal Commission.<sup>284</sup> One currently serving NCA officer has been the subject of adverse evidence. The Commission asked the Royal Commission to comment on the argument that it has taken the NSW Royal Commission to identify the 15 AFP officers and the NCA officer and to establish their misconduct. The Royal Commission advised that it had available to it whatever record it requested from the AFP and the NCA and full and enthusiastic co-operation. However, it was correct to say that in relation to the Joint Task Force the only available records were operational ones and there was no hint of corruption in these. The Royal Commission expressed the view that 'institutional complacency', amongst other factors, does militate against the detection of such activity and that accordingly a properly resourced investigation from outside the organisation does have the potential to go further than an internally based inquiry.

## **Should complaints and corruption be dealt with by one external agency?**

8.58 The DRP argued that a single external agency should deal with both complaints and corruption. The Commission considers that this is by far the best option. This is a different model to that proposed by the NSW Royal Commission into the Police which provides for a continuing role for the NSW Ombudsman.

### *Advantages of a single agency*

8.59 Corruption and other serious misconduct have to be met by a co-ordinated and systematic response that monitors and improves law enforcement cultures, practices and procedures but which also has in place an effective, credible and responsive system for investigating complaints and corruption. A single focused agency such as the NIIC has clear advantages in achieving those goals because it

- encourages a co-ordinated and systematic approach to criminal justice issues that by their nature involve many issues and systemic problems
- ensures that cases do not fall through the cracks existing where there is more than one agency involved
- avoids duplication of resources and effort
- centralises records and databases
- heightens public awareness on the problems of corruption and official misconduct because it is clearly the peak body
- makes it clear who has ultimate responsibility for ensuring accountability and transparency.

8.60 No submission in response to the DRP suggested that these were not advantages of a single agency although the Ombudsman argued that they were only 'superficially attractive' without explaining why this was so. The CJC is a single agency that does have a similar role in relation to complaints and corruption involving the Queensland Police Service as the NIIC would have in relation to the AFP and NCA. The CJC advised the Commission that it agreed with the above list of advantages and elaborated on some of the benefits.

8.61 The CJC advised that a single agency allows for a complete profile of officers and the organisation.<sup>285</sup> There is often a connection between apparently minor complaints and serious misconduct. For example, absence from duty or a failure to perform routine tasks could be a lead for detecting corruption. Those derelictions of duty raise the question of what the relevant officers were in fact doing. The CJC gave the example of apparently wide-scale police corruption in Victoria in the window shutter cases where a large number of Victorian police were apparently obtaining 'kickbacks' from certain window repair businesses to assist them to obtain business. Officers were absent from their normal duties or failed to perform them because they were involved in this corruption.

8.62 Ms J Saunders a lawyer with the ACT Legal Aid Office who deals frequently with clients who make complaints about their treatment by AFP officers also commented on the advantages of a full profile of officers' behaviour gained through having a single agency.<sup>286</sup> It facilitates the early identification of frequently arising problems, including AFP officers who are repeatedly the subject of complaints.

8.63 The CJC advised the Commission not to draw rigid distinctions between complaints and corruption.<sup>287</sup> The CJC had some investigative teams that focused on complaints and others that focused on corruption. The fact that the teams worked within the same organisation did not cause problems. In many cases complaints could provide relevant information for the purposes of corruption prevention and detection. Complaints as such rarely directly concern corruption but they will often provide useful information about the corrupt or potentially corrupt activities of officers.

8.64 The CJC also argued that having more than one agency dissipated funds and multiplied administrative costs and made it difficult to adopt a co-ordinated approach. There was also a problem with more than one agency in ensuring that staff were suitable and had appropriate supervision.

8.65 The Commission also believes that from a potential complainant's viewpoint a single agency is much more preferable. The evidence is that many potential complainants feel intimidated or reluctant to complain. Any possibility of their being shunted from one agency to another will only exacerbate these difficulties.

#### *Suggested disadvantages of a single agency*

8.66 There are three possible disadvantages of a single agency that are concerned with the distinction between complaints and corruption and the volume and nature of complaints that may be received.

- ***Blurs distinction between corruption and complaints.*** One suggested disadvantage of a single agency is that it would be unable to provide the necessary delineation between on the one hand its proactive, generally secretive response to corruption and on the other hand its largely reactive, consumer focused response to complaints.
- ***Day to day complaints would receive insufficient attention.*** The Ombudsman and the Western Australian Parliamentary Commissioner have suggested that with the establishment of the NIIC there would be a real danger that resources would be concentrated on the minority of very serious cases at the expense of the far greater number of complaints about day to day policing.
- ***A single agency would be swamped by complaints.*** The alternative argument to the above is that the NIIC would be swamped by the large number of complaints that were not serious. This would be to the detriment of the response to serious complaints.

8.67 The Ombudsman in her submission also argued that the recommendation of the NSW Commission that the NSW Ombudsman would continue to deal with the majority of police complaints against the NSW Police Service while the Police Integrity Commission focuses on corruption supports her claim that corruption and complaints function should not be dealt with by the one body.<sup>288</sup> According to the Ombudsman's submission this acknowledges that the nature of the responses needed to complaints and corruption are fundamentally different. The PIC would deal with some complaints but only as sources of information.

#### *Commission's response to these suggested disadvantages*

8.68 The Commission readily acknowledges that complaints and corruption require some differences in approach. The Commission has therefore recommended that the NIIC should have two separate divisions, that is, one dealing with complaints and the other corruption. The Office for Complaints would have its own specific budget that took into account its workload.

8.69 Complaints about day to day policing would receive appropriate and measured responses. There would be an effective and national system of informal resolution and investigation available for those 'day to day' complaints that require it. The Commission agrees that 'day to day' complaints should receive appropriate resources and attention. The NIIC would establish categories of complaints and guidelines to ensure that resources were expended efficiently and that this expenditure took into account the circumstances of each case. In contrast, a major defect under the current system with the Ombudsman providing limited external review is that the serious end of the spectrum of complaints and corruption has not received adequate external input. There is inadequate independent input to ensure that serious misconduct is identified and an appropriate response made. This has extremely deleterious effects on public perceptions of the integrity and accountability of the AFP because these are the cases that will often receive media attention and raise public interest.

8.70 The Commission has sought comment on the claims of the Ombudsman in relation to the NSW Royal Commission's findings and approach. The Royal Commission has advised the Commission that it is 'incorrect' to describe the NSW Ombudsman under the Royal Commission's proposals as a major investigator

in the complaints field. Rather, the Ombudsman would be a supervisor of the activities of the Police Service with a 'last resort' power of investigations.

8.71 According to the Royal Commission the PIC will investigate such serious matters of corruption which come to its attention, whether through complaints made initially to the Police Service or directly to the PIC, or through the PIC's own investigations.<sup>289</sup> The PIC would prioritise its resources and thus refer many matters to the Police Service for investigation. In some cases this would involve varying degrees of monitoring by the PIC; in some cases the possibility exists for joint operations or the formation of a Police Taskforce to deal with a particular matter if it is outside the capabilities of the Office of Professional Responsibility, where most matters will be referred. It is expected that the Ombudsman and the PIC would enter into an arrangement where complaints of a particular class or kind would be referred by the Ombudsman to the PIC for appraisal and a decision made by the PIC in accordance with the above options. A decision by the PIC to take over a complaint removes it from the statutory system of complaints.

8.72 In the Commission's view the Ombudsman's submission misrepresents what the Royal Commission is intending to occur in NSW. The NSW Ombudsman will be a supervisor of police investigations, not an investigator. Further, the Commission considers that the Ombudsman has exaggerated the rigidity of the so-called dichotomy between complaints and corruption. The PIC will determine to what extent it investigates complaints and will also appraise certain categories of complaints that are referred to it by the Ombudsman.

8.73 The NSW Royal Commission in its interim report did not oppose in principle having a single agency. It maintained that there were advantages and disadvantages. It readily acknowledged the advantages of a single agency as outlined above. It did not characterise those advantages of a single agency as being illusory or as being 'superficially attractive'. It decided against a single agency in NSW for the reasons discussed in chapter 4. The Commission in that chapter explains how those suggested disadvantages would not be significant in the context of the AFP and the NCA.

8.74 In particular, the NSW Royal Commission was concerned that the large number of police complaints in NSW (for 1994-95, 5537 complaints) might swamp a single agency. However, for the same period the AFP reported 900 and the NCA 18 complaints. The difference then between the NSW volume and the likely volume of the AFP and NCA is over fivefold on those figures. The difference in volume may in fact be greater and increasing. The NSW Ombudsman in her 1995-96 Annual Report states that the number of written complaints against the NSW Police Service was 5336 an increase of 5.5% while the number of oral complaints increased by 16% to 2777.<sup>290</sup> That is a total of 8113 complaints in relation to the NSW Police Service in 1995-96. In the same period the number of complaints against the AFP was 1157 and there were 79 allegations - a total of 1236. These latest figures suggest a difference in volume of about seven times.

8.75 The Western Australian Parliamentary Commissioner submitted that this argument that the smaller volume of complaints at the federal level when compared to NSW is a reason to support a single agency is misdirected because it is the nature of the complaints rather than their number which is significant.<sup>291</sup> The Commission's response is that the NSW Royal Commission was in fact considering the number of complaints as the significant factor. However, when the nature of the complaints is considered this does support the capacity of a single agency to deal with AFP and NCA complaints. The NIIC would introduce guidelines about classifications of complaints and a national system of effective informal resolution of minor complaints. A majority of complaints would be dealt with initially by the AFP or the NCA by means of informal resolution. These measures would ensure that the number of complaints dealt with by the NIIC in terms of investigation would be relatively small.

8.76 This view is supported by the experience of the CJC which advised the Commission that it has been able to deal with receiving the full range of complaints by adopting effective filtering processes so that the appropriate amount of time and resources were devoted to the particular matter.<sup>292</sup> The CJC had an effective system to determine quickly what matters should be returned to the Queensland Police Service for a response.

8.77 It should also be noted that the Police Board of New South Wales in its submission to the NSW Royal Commission recommended a single agency for complaints and corruption. It recommended that the one body should have separate complaints and corruption divisions, in the same way that the Commission is proposing

for the NIIC. The Board in its submission referred to the number of statutory bodies and persons in NSW who may perform investigatory functions concerning complaints against the police and allegations of corruption - the Ombudsman, the ICAC, the New South Wales Crime Commission and the Police Service itself. The Board stated that the lack of precise definition of function between those agencies may lead to a duplication of activities or matters 'falling between two stools'. It continued as follows.

The present system has produced an imbalance. Too little time and resources have been devoted to the investigation of police corruption by pro-active and other means. In comparative terms, too much time and resources have been devoted to a somewhat complex and inflexible system of investigating complaints against the police.<sup>293</sup>

8.78 The Commission believes that these observations are also applicable to the current AFP complaints system.

## **Civil liberties issues**

### *Senator Cooney's views*

8.79 A submission from Senator B C Cooney questioned the impact of the NIIC on civil liberties.<sup>294</sup> It argued that the establishment of another new body with permanent royal commission powers would present a real risk to the sort of liberal and democratic society Australia ought to be. Senator Cooney, while agreeing that it is in the public interest to keep the AFP and the NCA free of corruption and wrongdoing, also argued that it is in the public interest for the community to be free, confident, co-operative and forthright and within which its citizens might flourish. He was concerned that the civil liberties of AFP and NCA officers would be jeopardised by the establishment of the NIIC. He concluded by stating that any problem which presently exists with the AFP or the NCA has not reached the point where it threatens the community to the extent that radical changes are needed to remedy it.

### *Commission's response*

8.80 Senator Cooney has referred to what he considers to be an increasing proliferation of bodies with royal commission powers. It is not within the Commission's terms of reference to comment on whether particular bodies such as the NCA, the CJC or the ICAC that have such powers should continue to exist or how they should exercise those powers. The Commission is limited in this inquiry to considering what ought to be in place to deal with complaints and misconduct in relation to the AFP and the NCA.

8.81 The Commission has recommended the establishment of the NIIC with royal commission powers because research and experience clearly show that a body with those far reaching powers is necessary to deal with misconduct and corruption within law enforcement agencies. This is borne out by the work of the Fitzgerald inquiry in Queensland and the NSW Royal Commission into the Police. In both cases it required an independent and external commission with far reaching powers to identify those officers guilty of corruption and serious misconduct, to obtain evidence against them and to be able to provide a comprehensive analysis of the state of health of those particular police services at the time.

8.82 Senator Cooney has identified the public interest in keeping the AFP and the NCA free of corruption and misconduct. Chapter 9 discusses in detail the crucial importance of the objectives of complaints and anti-corruption systems for the AFP and the NCA and the significant and constant impediments to achieving those objectives. That chapter demonstrates why a body with royal commission powers is needed as an effective watchdog. In short, the value of the objectives and the undoubted problems in attaining them justifies the granting of royal commission powers that certainly should not be granted without a clear case being made out for their necessity. However, the Commission would emphasise the following points here in response to Senator Cooney's concerns.

8.83 In the Commission's view there is a very crucial public interest in ensuring that the AFP and the NCA are accountable and 'clean'.

8.84 A wide range of rights and liberties may be affected by the actions of law enforcement agencies. These include the right to equality, liberty and privacy, to a fair trial and the right not to be subjected to cruel, inhuman or degrading treatment. Individuals have basic rights not to have their private affairs interfered with

without just cause; to be able freely to travel and to associate and communicate with whomever they wish without arbitrary interference, and to expect that the State and its organs such as the police treat individuals equally and without discrimination on illegitimate grounds.

8.85 In Australia, these rights are protected to varying degrees by existing legislation or common law. In addition, they are all protected by the International Covenant on Civil and Political Rights to which Australia is a party. Breach of any one of these rights by a law enforcement agency will almost certainly provide grounds for complaints being brought against them although whether a person will make a complaint is much more problematic as is the capacity of current complaints systems to determine the substance of complaints. Law enforcement agencies must understand and respect the rights and liberties of citizens. The agencies and their officers must act within the law. These objectives demand effective complaints and anti-corruption systems. The AFP and the NCA are the two leading national law enforcement bodies with a focus on organised crime including the drug trade and large scale fraud. These are matters of vital concern to the Australian community. In relation to the NCA and the AFP, the NIIC would provide the necessary investigative capacity and oversight to help to ensure that these agencies do understand and respect the civil liberties of citizens and that they do act within the law.

8.86 The Commission considers that the NIIC as it is proposed is a positive benefit to the protection of the civil liberties of the Australian community and reflects a world wide concern with minimising the misconduct and corruption of law enforcement agencies. Further, the Commission considers that the NIIC is consistent with the terms and spirit of

- the International Covenant on Civil and Political Rights
- the Convention on the Elimination of All Forms of Discrimination Against Women
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of the Child.

8.87 The NIIC would help to ensure that the AFP and the NCA in their law enforcement activities and within their organisations are free of sexual or racial discrimination or harassment. It would assist in ensuring that citizens are protected from false or arbitrary arrest or detention or from the use of excessive force or other illegal treatment. The NIIC would pay special attention to the needs of groups within the community and within the AFP and the NCA who may have vulnerabilities in relation to the AFP and the NCA. This includes young people, women, Aborigines and Torres Strait Islanders, people from non-English speaking backgrounds, gays and lesbians and people with disabilities. As discussed in chapter 17 the Commission has put together a package of recommendations to ensure that these special concerns are met with effective responses by the NIIC and the AFP and NCA. In chapter 15 the Commission has also recommended measures to improve the accessibility and outreach of the NIIC into the community.

8.88 The Commission has balanced those concerns about the effects of law enforcement agencies on the civil liberties of the community with a proper concern for the civil liberties of individual officers. Law enforcement officers must have the same rights as any other citizen in relation to criminal investigation and trial. They must also be treated fairly and impartially when they are the subject of a complaint. There must be no presumption in the investigation or handling of a complaint that an officer has done something wrong. Deliberately false complaints should be subject to appropriate consideration to determine whether criminal charges should be laid against the perpetrator. There must be a practice that anonymous complaints are the subject of proper initial inquiry before a full investigation is launched. Any officer the subject of disciplinary action must receive fair treatment and be accorded natural justice. Disciplinary decisions should be made according to law and subject to appropriate merits review and determined without undue delay. There must be consistency of treatment. The sanction of deducting superannuation for a disciplinary offence against AFP officers should be abolished because it is a criminal sanction which currently unfairly singles out AFP officers. The traditional quasi-military disciplinary approach should be totally abandoned. The use of

disciplinary action for any minor infringement, particularly for those which have no impact on the interaction with the community, should be a thing of the past.

8.89 Officers must receive adequate information about the progress of the investigation of complaints made against them and any disciplinary action taken. There should be a wider range of complaint outcomes to recognise that officers may have acted properly and reasonably and indeed with the greatest integrity and probity.

8.90 The Commission's recommendations reflect each of these principles described above.

8.91 Just as these principles are supported there must also be a recognition that law enforcement officers are given powers and discretions under significant public trust. A breach of that trust by those who are meant to uphold the law damages the efficacy of the 'Rule of Law' which is an integral part of the protection of civil liberties in this community. It is difficult to ask the public to uphold and respect the law and the civil liberties of others when the community's law enforcement officers fail to do so or are seen as failing to do so. Moreover, the failure to prevent or punish misconduct and corruption within law enforcement agencies encourages those who breach the law to carry on and to expand their activities. It increases the confidence of 'crooked officers' and those who run large scale criminal organisations. The AFP and the NCA should be providing the benchmark to the rest of the law enforcement community and to the community as a whole on integrity and accountability. The Commission is sure that the management of the AFP and the NCA support those principles as would their staff.

8.92 It should also be noted that the Ombudsman, who is currently expected to provide external scrutiny of the Complaints Act, already has powers that to a significant extent are equivalent to royal commission powers.

8.93 The Commission also notes that the Council for Civil Liberties, the Law Council and the Queensland Law Society each supported a body with royal commission powers. These are organisations with a traditional role in advocating the protection of civil liberties from excesses by the State. However, they did not share Senator Cooney's views.

8.94 In considering the structure, powers and role of the NIIC the Commission has attempted to balance that compelling necessity for sufficient powers with protection of individual rights and liberties. The latter would be protected by the following measures.

8.95 The NIIC would be subject to

- review under the Administrative Decisions (Judicial Review) Act 1977 (Cth)
- the Privacy Act 1984 (Cth) and
- the Freedom of Information Act 1982 (Cth).

8.96 It would be accountable to the Attorney-General, that is, the First Law Officer of the Commonwealth, and could be required to report on particular matters in addition to providing Annual Reports. There would be a protocol with the Attorney-General's Department for monitoring and responding to any complaints made about the activities of the NIIC or its personnel. The NIIC would be required to monitor and report, subject to operational security and privacy considerations, on the use of its compulsory powers.

8.97 The Chairperson would be a judge or retired judge or a person with appropriate legal experience in the responsibilities of exercising significant powers. The Commissioner for Complaints would most likely be experienced in consumer rights and social justice issues. All NIIC staff would be on fixed term appointments and subject to performance appraisal.

## Cost effectiveness

8.98 One argument used by those who opposed or questioned the need for the NIIC was that it was not the most cost effective response. The DRP made the following comments on the staff and funding of the NIIC.

### Staffing

8.99 The DRP envisaged a staff of about 30 people. That would include a modest Secretariat and a core of people with extensive investigative and legal experience in policing or other investigative work. The Commission estimated that about 15 investigators would be needed. Other aspects of staffing are considered in chapter 6.

### Funding

8.100 The NIIC would be federally funded. The Commission's preliminary estimate was that funding would be in the order of three and a half to four million dollars annually.

8.101 The Commission considered that a very substantial part of the NIIC's funding could be obtained from off-sets from the current system, by greater efficiencies and appropriate contributions by the NCA and the States and Territories in relation to the operations of the NCA. Off-sets would be available by removing the Ombudsman's supervisory role in this area, some reduction in the AFP's role and the abolition of the Federal Police Disciplinary Tribunal (FPDT). Efficiencies would result from the consolidation of the complaints and investigative functions of the AFP's IID and ISA, the more effective use of informal resolution and a more streamlined system of review of disciplinary decisions. The NCA and the States and Territories should make contributions to funding according to the expected role of the NIIC in relation to the NCA.

8.102 The Commission in attempting to estimate funding and off-sets sought information from the Ombudsman and the AFP about their current levels of staffing and resources for dealing with complaints against the AFP. The Commission considered that the information provided and as described immediately below was not sufficient to provide a completely accurate account of current spending.

#### *Off-sets from the Ombudsman's current role*

8.103 The Ombudsman advised the Commission that she is unable to break down the expenditure against parts of her jurisdiction. The best estimate that the Ombudsman could provide in relation to the AFP was as follows:

1992/93	approx \$618 700
1993/94	approx \$769 000
1994/95	approx \$475 500

8.104 The Commission considered that, as a preliminary estimate which is based on the information currently provided, 95% of the Ombudsman's average expenditure on the AFP complaints system over the last three years, that is, approximately \$590 000 could be made available to the NIIC.<sup>295</sup>

#### *Off-sets and efficiencies from the AFP*

8.105 According to the information provided by the AFP the combined funding for IID and ISA for the financial year 1995-96 was \$4 871 899. This was made up as follows.

**Table 1**

<b><i>IID funding</i></b>	
Salary	\$1 032 976
Allowances	\$250 000
Penalties	\$14 070

Overtime	\$41 659
Administrative expenses	\$160 369
Total	\$1 499 074
<b>ISA funding</b>	
Salary	\$2 175 357
Allowances	\$100 000
Penalties	\$5 679
Overtime	\$116 845
Administrative expenses	\$909 872
Total	\$3 372 825

8.106 The Commission considered that this may under-estimate the total cost because it does not include employer contributions to superannuation which the AFP advised was 16.1% of salary expenditure.

8.107 The Commission estimated that perhaps 40% of that current combined funding could be available for the NIIC as the NIIC would be assuming that approximate percentage of the AFP's current role. It would be investigating itself very serious complaints and corruption and would be providing management or supervision of the remainder of matters that require investigation. The adoption of an effective workplace resolution scheme across Australia would significantly reduce IID expenditure because for those matters the IID should have no role. The NIIC would provide any auditing or review of that process. There are also the following areas of the AFP system that could contribute to the figure of 40% of the current funding.

8.108 The Commission also considered that the proposed amalgamation of ISA and the IID would result in a saving of funds by reducing administrative costs. The Commission noted that there are now currently about 50 personnel in ISA and 22 in the IID. The Commission was of the view that *prima facie* this appears to be a larger number of staff than should be necessary to perform the allotted tasks. The Commission anticipated that savings on administration could be found.

8.109 The Commission was of the view that there were other factors which should reduce IID costs and use of resources. The introduction of a comprehensive anti-fraud and anti-corruption plan recommended in chapter 13 of this report would also reduce expenditure by the AFP on investigations. An effective pro-active plan with integrity testing, risk assessment and regular review should reduce the scope for fraud and corruption. An effective and comprehensive risk management system for IID investigations should result in a more cost efficient use of investigative resources with strategic targetting of high risk cases.

8.110 The Commission also suggested that its proposals for reforming the disciplinary process should result in savings to the AFP. Fewer matters should proceed to fully contested hearings and those that do should be determined more quickly.

8.111 The total from these estimates about the availability of funds from the AFP which the Commission considered to be conservative if the operation of the current system were to be audited was approximately \$1.2 million.

#### ***Off-sets from the FPDT***

8.112 The 1994-5 Annual Report of the FPDT indicated that its budget was about \$30000. The Commission considered that the whole of this amount should be available as an off-set to the NIIC. The Commission considered that this amount under-estimated the total costs of the Tribunal as it does not include the full costs of judges and personnel (eg salaries including superannuation, allowances and administrative costs).

### ***NCA related funding***

8.113 The Commission estimated that the NCA should contribute \$150000 per year and the States and Territories would provide a combined total of \$150000 per year. These contributions are discussed in detail in chapter 5.

### ***NIIC's likely workload***

8.114 The Commission argued that it is important to try to assess the likely workload of the NIIC in estimating its staffing and resources. There are a number of reasons to suggest that the workload of the NIIC will not be as heavy as one might first imagine.

8.115 The latest AFP statistics for 1995-96 indicate that there was a total of 740 complaints made by 469 complainants and 79 allegations. There were only 469 complainants but 740 complaints because many complaints and allegations arise out of the one incident. The task of investigating and resolving these related complaints and allegations is thus reduced. Many in practical terms will involve the one investigation and the consideration of the same evidence.

8.116 The level of complaints about the NCA is about 17 per year, although the Commission would expect that this would increase with the introduction of a formal system. Nevertheless the workload of the NIIC in connection with the NCA is unlikely to be significant in terms of raw numbers of complaints.

8.117 Only about half the number of complaints lodged will be investigated at all. Some will be formally withdrawn and in relation to others there will be a decision not to investigate because the complaint lacks substance or credibility, is trivial or is too old. Moreover a significant number of complaints will be dealt with by informal resolution without the need for investigation. The Commission expected that with the introduction of a national system for the informal resolution of customer service or internal management types of complaints the number of investigated complaints should be reduced with resulting benefits to the efficiency of the complaints system. The Commission anticipated that about 70% of all complaints and allegations should be capable of being resolved informally. In relation to these informally resolved matters the NIIC would essentially take a monitoring and auditing role. It would be sent a record of the matter and would check to see whether the complainant was satisfied with the process. Its only other general function in relation to these matters will be to conduct random audits to ensure quality control.

8.118 At the more serious end of the spectrum the NIIC would be conducting about 40 to 50 complaint investigations itself each year. The Ombudsman's estimate for an effective complaints system is that 40 to 50 complaints each year should be investigated externally and not by the AFP. In the large majority of cases the NIIC would not be providing the primary input into the investigation. It would either be managing or overseeing. In many cases this would be overseeing which would mean that the bulk of the 'legwork' and interviewing would be carried out by the AFP or the NCA possibly in co-operation with other agencies. These investigations would be carried out according to detailed guidelines determined by the NIIC and the AFP or the NCA. The NIIC would not be duplicating the investigative facilities and resources of the AFP or the NCA. It would not require its own surveillance equipment. It would direct the use of AFP and NCA resources and equipment.

### ***Commission's assessment of NIIC's funding***

8.119 The Commission considered that there is significant scope within the current resources allocated to the AFP complaints and disciplinary system to off-set a significant part of the funding necessary for the establishment and operation of the NIIC, resulting in the introduction of the NIIC being cost neutral. However, it stressed that a more detailed analysis of the expenditure of the current system and the proposed NIIC would be necessary to assess more accurately relative costs.

8.120 A summary of the off-sets and efficiencies that the Commission considered from this initial examination are reasonable is as follows

Ombudsman

\$590 000

AFP	\$1 200 000
FPDT	\$30 000
NCA	\$150 000
States and Territories (excluding the ACT)	<u>\$150 000</u>
Total	<u>\$2 120 000</u>

8.121 The Commission also argued that there are also other cost factors that are more difficult to quantify but nonetheless necessary to consider. They relate to effectiveness and credibility.

8.122 An effective complaints and anti-corruption system may be much more cost efficient in the mid to long term than current approaches because it should reduce the incidence of corruption and misconduct. Dealing with these problems after they occur, particularly when Royal Commissions or special inquiries become necessary, rather than having systems that can prevent, deter or identify them early is a false economy at best.

8.123 A credible complaints, corruption and disciplinary process may also be cost efficient at the macro level. Effective law enforcement and crime prevention rely heavily on the co-operation and assistance of the public. Having a credible complaints and disciplinary system is an essential part of ensuring that confidence. An absence of this co-operation and assistance means that more resources must be pumped into investigating crimes committed and dealing with the consequences of crime.

8.124 The Commission believes that the system that it proposed could even be cost neutral if a thorough analysis of the operation of the expenditure of the current system were undertaken and appropriate off-sets and savings made. However, if it were to be found that some additional funding was necessary either on a regular basis or in response to special circumstances such as a very extensive investigation involving a high level of investigative resources, the Commission was still of the view that its draft recommendations for a new system were clearly justified. The defects of the current systems<sup>296</sup> and the undoubted importance of the integrity and accountability of the AFP<sup>297</sup> and the NCA<sup>298</sup> demonstrated the need for these suggested changes.

### **Additional comments on current expenditure**

8.125 In chapter 5 the Commission has suggested that the NCA has already spent a considerable amount of resources and time on dealing with complaints and challenges to its activities that an NIIC would be able to do more effectively, expeditiously and efficiently. In fact the NIIC would in many cases remove the need for the inquiry in the first place because it would have a proactive and preventive function. The same reasoning also applies to the AFP.

8.126 The funding of the Harrison inquiry into certain allegations of AFP corruption is not being met by the AFP but by the Attorney-General's Department. However the exact source is not as significant as the fact that it is all from the public purse. These are matters that the NIIC would have examined in the course of its work and with the advantage of being fully established and with appropriate expertise to perform the task.

8.127 The Commission also sought further details from the AFP on the cost of surveillance which is commonly regarded as one of the most expensive items for complaints and corruption investigations. The AFP advised that there are no funds allocated to either ISA or IID for the purchase and maintenance of surveillance equipment.<sup>299</sup> They both use the services of other AFP areas, that is, ACT Surveillance or the Police Technical Units. The AFP advised that the cost of surveillance for ISA in 1995-96 was \$16612. The AFP also advised that \$112585 was expended on a major investigation that ran over the period from 1994 to 1995. IID had no expenditure on surveillance for 1995-96.

8.128 While there are no precise figures available it does not appear that the expenditure on surveillance is a very large component of expenditure for the IID and ISA. In the Commission's view this lends support to the capacity of the NIIC to conduct or manage serious investigations using AFP facilities where necessary. It also suggests that an effective audit of the IID's and ISA's roles and functions might find significant savings

because one of the expected very resource intensive items does not appear to be costing a significant amount. Clearly very few investigations require extensive surveillance.

## Submissions

### *The Attorney-General's Department*

8.129 The Attorney-General's Department expressed the view that there was general concern that the figures quoted for the funding of the NIIC are inaccurate and understate the actual cost of setting it up.<sup>300</sup> In particular, considerable off-sets from the AFP's budget are proposed by the Commission. According to the Department this does not appear to acknowledge that about 70% of complaints about the AFP would be referred back to it for direct investigation with oversight from the NIIC. Therefore the AFP would require sufficient staffing and resource levels to deal effectively and efficiently with those complaints.

### *The AFP*

8.130 The AFP submission argued that based on its experience to date the direct investigative workload of an external body would not justify the existence of a standing group of investigators which would maintain viability as to the members and the mix of skills they require.<sup>301</sup> The submission indicated that the most appropriate budgetary arrangement would be one that recognises the need to deploy teams of various sizes and skills, depending upon the nature and focus of the investigation.

8.131 The submission suggested that as the AFP would still conduct the vast majority of investigations in relation to the AFP there would be little scope for reducing AFP expenditure. It suggested that if AFP audit processes are further enhanced, as should occur, there may need to be increased resources in the complaints system.

8.132 *Commission's response.* The Commission reaffirms its view that the NIIC should have a small group of skilled and appropriately experienced investigators. The figure suggested in the DRP was 15. Those investigators would have a core of permanent work in conducting or overseeing complaints and corruption investigations. Their direct investigative work would focus on serious criminality and corruption and complaints which raised significant public interest that demanded solely external input or essentially external input. For less serious matters they would mainly oversight investigations by others, principally investigations carried out by AFP and NCA personnel. The Commission understands that ISA currently has a standing group of about 28 investigators and the IID has 19. It therefore finds the AFP's comment about the NIIC having no need for a standing group of investigators curious. Certainly, however, there would be a need for a flexible budget to ensure that staffing matched changing requirements and for the quick secondment of appropriate staff on a needs basis.

### *The Ombudsman*

8.133 The Ombudsman submitted that her office would provide a much more cost effective mechanism for undertaking the complaint handling mechanism function suggested for the NIIC.<sup>302</sup> Her view was that the Ombudsman with a relatively slight increase in resources and some increase in powers would address the problems identified in the current system. The Ombudsman's office already has

- established infrastructure, including modern information technology, which examines the pattern of complaints
- officers in all mainland capital cities for independent receipt of complaints
- existing experienced staff who would form the nucleus of an enhanced police complaints capacity
- internal training and other corporate and policy support that is desirable for complaint investigations
- standing within both the general community and the AFP as to its independence

8.134 In contrast the Ombudsman argues that establishing a new organisation would involve establishment costs.

### *Commission's response*

8.135 **General comments.** The DRP acknowledged that the Commission was presenting preliminary estimates only which were based on available information. No submission to the DRP has provided any specific analysis or assessment of the Commission's estimates. No alternative figures have been suggested either as to the appropriate amounts that could be off-set or to the amount that would be needed to fund the NIIC.

8.136 Clearly some amount of offsetting would be available. The Commission cannot see how that fact can be disputed. The AFP and the NCA would not be performing all the functions that they currently do. The NIIC would be replacing the Ombudsman in the AFP complaints system. By the Ombudsman's own estimate she currently spends at least \$475000 on AFP complaints.

8.137 The NIIC would in some cases be providing a significant amount of the primary investigation itself. This might amount to 40 to 50 of the most complex and serious cases. This would be work that the AFP currently must perform itself. The NIIC would also be providing direct supervision of other cases. That supervision should now be provided for by the AFP. The NIIC would also be auditing and reviewing the AFP's handling of minor complaints, a task that is currently performed by the AFP.

8.138 The criticisms of the Commission's estimates also fail to take into account or assess the efficiencies that the Commission expects can be made in relation to the complaints systems.

8.139 The Commission estimated that about 70% of all complaints could be resolved informally with an effective, national system of informal resolution. No submission challenged this estimate.

8.140 The Commission also argued that an effective risk assessment program with co-ordinated anti-corruption and anti-fraud plans and subject to the NIIC's auditing and review would reduce the incidence of misconduct and better target investigative resources. That argument has not been controverted.

8.141 The Ombudsman has commented on the fact that the NSW PIC will have about 70 staff and a budget of about 10 to 15 million dollars. In any attempt to compare these figures with those estimated by the Commission for the NIIC it should be borne in mind that the NSW Police Service has a total staff of over 16000<sup>303</sup> as compared to the AFP's 2500 and the NCA's 400. The NSW Police Service is also subject to about five times the number of complaints as the AFP and NCA combined. Moreover, the PIC will be taking over the work of the NSW Royal Commission which has made findings of serious and systemic corruption within the NSW Police Service. The workload of the PIC is bound to be very considerable for some time. The NIIC would not have such a workload and under the Commission's recommendations it would be using to a great extent the surveillance and forensic facilities of the AFP.

### *Comparison with the Ombudsman's enhanced role*

8.142 The Commission has canvassed the inadequacies of the current AFP complaints system where the Ombudsman oversees the process. That system is not meeting its objectives. Furthermore, it is the view of the Commission that the Ombudsman is fundamentally unsuited for the tasks that must be carried out to achieve those objectives. Comparative claims about cost efficiency can only be relevant where both bodies can achieve the core objectives. 'Cost effectiveness' does not mean cheapest. It means an approach that achieves core objectives in the most efficient and inexpensive way. In that sense then it is misleading to compare costs when the Ombudsman is unable to meet the necessary prerequisite of standards. However, in any event the Commission does not consider that enhancing the Ombudsman's role would result in a significantly cheaper option.

8.143 It is simply wrong to assume that the Ombudsman already has in place a satisfactory and working system even for dealing with day to day complaints, that is, without considering serious complaints and corruption. The Ombudsman has conceded that she would require additional resources to perform her AFP complaints role to what she considers to be a satisfactory level. In other words whether there is an NIIC or

the Ombudsman remains there would still need to be additional resources. In her submission to the DRP the Ombudsman gave no indication of how much additional funding she might require to perform the tasks that the NIIC would perform. However, in previous correspondence to the Commission she indicated that for her office to perform the complaints functions adequately would require \$1 million.<sup>304</sup> She also suggested that for her office to conduct 40 to 50 additional independent investigations plus supervision of the more serious complaints investigated by the IID would require about 13 full time staff including 6 to 8 investigators. For her office to take on handling of complaints against the NCA would require an additional 4 staff.

8.144 In relation to the Ombudsman's arguments about the greater cost effectiveness of her enhanced role the Commission makes the following comments.

8.145 *The Ombudsman's existing infrastructure.* The Ombudsman's existing infrastructure for AFP complaints is not extensive or something that could not be readily replicated and surpassed by a new agency such as the NIIC. The Ombudsman has about seven staff who work regularly in the area although no person works exclusively on these matters. The Ombudsman's claimed modern information technology does not yet run to a shared database with the AFP or a common system of complaints classification.

8.146 In any event there would be a transition period and consultation between the NIIC and the Ombudsman so that the NIIC would have access to the Ombudsman's existing files and data, including computer data. It would not appear to be a difficult matter to ensure that the NIIC was given all relevant information. The NIIC would not be starting its information base from scratch but instead building on what already existed.

8.147 *Offices in all mainland capital cities.* The Commission proposes that the Ombudsman's offices should remain as formal lodgment points for AFP complaints and become so for NCA complaints. Therefore the removal of the Ombudsman from investigating complaints would not reduce the current coverage of the AFP complaints system. Under the Ombudsman's current arrangements her regional offices refer complaints about the AFP to her head office for consideration and investigation. The regional offices are essentially receipt points and do little more.

8.148 Moreover, the extent of the Ombudsman's efforts to provide services to places other than Canberra and the large capital cities is the subject of some controversy particularly in the Northern Territory (NT) and Tasmania.

8.149 The Commonwealth Ombudsman has terminated the arrangement with the NT Ombudsman whereby the latter acted as Delegate for the Commonwealth Ombudsman in respect of complaints within the Territory against Commonwealth Government Departments and authorities (including the AFP).<sup>305</sup> In April 1995 the Commonwealth Ombudsman advised the NT Ombudsman that she in effect considered that the expense of the arrangement was no longer justifiable and that recent initiatives would ensure no reduction in the quality of service. She apparently had no dissatisfaction with the level of the service provided by the NT Ombudsman. In its place a part time officer (20 hours per week), employed by the Commonwealth Ombudsman is based in the NT Ombudsman's office and access is provided to a toll free number when that officer is unavailable.

8.150 The NT Ombudsman's view was that the new arrangement will represent a significant reduction in the quality of service provided to the NT community, particularly outside the Darwin area and most notably in Alice Springs.<sup>306</sup>

8.151 The Commonwealth Ombudsman has no office in Tasmania. The Tasmanian Ombudsman, Mr Green, has an arrangement with the Commonwealth Ombudsman so that complaints received by him about the AFP are simply referred on to the Commonwealth Ombudsman.<sup>307</sup> Mr Green has commented that unlike all other State Ombudsmen, he also continues to act as delegate for the Commonwealth Ombudsman and Commonwealth complaints comprise a significant part of his annual workload. However, he has commented that the funding by the Commonwealth Ombudsman is inadequate given the service provided.

8.152 In her 1995-96 Annual Report the Commonwealth Ombudsman suggested her office might have to take cost cutting measures in response to required budget savings. These measures might include

- an increase in discretion rates, that is, where the Ombudsman declines to investigate
- possible closure of regional offices in Darwin, Adelaide, Perth and Brisbane.

8.153 A consideration of all of these matters leads the Commission to the view that the removal of the Ombudsman from the AFP complaints jurisdiction would not impair the treatment of complaints against the AFP throughout Australia.

8.154 **Experienced staff.** In the Commission's view the current number and relevant experience of the Ombudsman's staff does little to bolster the Ombudsman's claim for maintaining her role in law enforcement complaints. As noted above there are few Ombudsman staff involved in the AFP complaints area. Further, as Professor Pearce has said, the Ombudsman's office lacks staff who have the investigative skills and experience necessary to conduct major investigations into law enforcement complaints and corruption. Nonetheless, staff of the Ombudsman's office would be able to apply for positions with the NIIC which would choose staff subject on merit and subject to the overriding criterion that the NIIC is seen as a new, independent body.

8.155 **Training and corporate support.** The Ombudsman did not supply details about what this training and corporate support involved. However, there is little point in having training or corporate support if the core skills of effective investigation are not available. The NIIC would have its own training and corporate support with the advantage that this would be focussed on the specific needs of the NIIC. In contrast the Ombudsman's training and corporate support has a very wide coverage because the Ombudsman has a very broad and diverse jurisdiction. In addition one of the great advantages of the NIIC would be that it would have a special unit dedicated to analysing complaint and corruption statistics and trends and policy issues.

8.156 **Standing with complainants and the general community.** The Commission's consultations and submissions received do not demonstrate that the Ombudsman has good standing or reputation in this area. In fact they indicate that the Ombudsman has a poor reputation.

8.157 **Use of informal resolution.** The Ombudsman questioned whether an effective workplace resolution scheme across Australia would 'significantly reduce the expenditure of IID'. She advised that currently few complaints lodged outside the ACT would be suitable for informal resolution as they tend to relate to serious matters such as the execution of search warrants. Therefore only nominal savings would result from the adoption of effective informal resolution.

8.158 The Commission did not suggest in its DRP that savings from the introduction of an national informal resolution system would be 'significant'. It said that it would result in benefits to efficiency. Most complaints and allegations do arise in the ACT - 565 out of the total of 740 complainants and 39 out of the total of 61 allegations. However, the costs of using informal resolution should be considerably less than for full investigations and so a national system would still result in worthwhile savings. It should be borne in mind that it was only in April 1995 that the Ombudsman introduced a more effective informal resolution scheme in the ACT on a trial basis. That is, some 15 years after the AFP complaints legislation was introduced.

8.159 The Ombudsman in her 1994-95 Annual Report commented that the AFP in that year resolved 143 complaints (21%) by conciliation. The 1995-96 Annual Report records that the AFP resolved 169 complaints out of a total of 737 by conciliation. The AFP commented that about 25% of all complaints were subject to workplace resolution.<sup>308</sup> By contrast the Victorian Ombudsman has advised that it resolved by informal resolution some 49% of complaints it received.

8.160 In the Commission's view there is clearly considerable scope for greater use of informal resolution. It is also clear that this will result in very significant efficiencies because conducting full investigations is usually a very resource intensive process. On the basis of comparison with the Victorian results a reduction of about 25% of the number of full investigations should result in very significant savings. The Ombudsman's 1995-96 Annual Report states that for that period 264 complaints were investigated to an outcome. If this was reduced by 25% only 198 complaints would be investigated.

### ***Comparative funding***

8.161 ***The South Australian Police Complaints Authority.*** The Ombudsman in her submission used the example of the South Australian Police Complaints Authority (PCA) to support her argument that the Commission has seriously under-estimated the likely cost of a stand alone body such as the NIIC.<sup>309</sup> The Ombudsman noted that, following a review in 1994, the South Australian Attorney-General's Department found that to be effective, the South Australian PCA, a stand alone body, required 18 full time staff. At that time the average number of complaints received per year in South Australia was 900. The Ombudsman's submission added that 'significantly the Authority conducts no investigations into police conduct but rather reviews the police internal investigations.' The Ombudsman explained in a footnote that the PCA does carry out its own investigations into practice and procedure matters.

8.162 The conclusion that the Ombudsman drew in her submission was that the South Australian Attorney-General's Department's estimate of 18 staff for a stand alone body, mainly reviewing internal investigations, and dealing with some 900 complaints shows that it is unrealistic to expect a new federal body to deal proactively with 800-900 complaints and identify/investigate corruption with only 30 staff given the resource intensive nature of corruption investigations.

8.163 ***Commissions' views.*** The Commission has consulted with the South Australian PCA. It advised that it currently has 13 staff handling about 1200 complaints.<sup>310</sup> Its budget is about \$808 000 per annum. Furthermore, it carries out a considerable number of its own primary investigations which are not limited to 'practice and procedure' as suggested by the Ombudsman. It advised that many of these investigations involve significant investigation, including interviewing witnesses and collecting and assessing evidence. In the last year it has conducted 24 primary investigations and the year before that 19. All of these primary investigations were carried out by one investigator who has this as his major task.

8.164 The Commission also consulted with the Victorian Ombudsman who advised that in the year 1995-96 it had 12 staff involved in police complaints and opened 2345 complaint files. Its budget for police complaints was estimated at \$1020000. The Victorian Ombudsman's office in that period carried out 14 primary investigations and as well, the Deputy Ombudsman, on his own initiative, completed further investigations into 38 cases containing 149 allegations. In response to requests from complainants, another 104 cases were re-opened and examined by the Deputy Ombudsman during the year. In that same period, the examination of 84 cases was completed while 40 cases remained under consideration. During the period the Ombudsman handled 1119 allegations directly by means short of formal investigation. Of complaints against police received at the Ombudsman's Office and completed in 1995-6, 49.6% were handled informally. The Victorian Ombudsman's office also indicated that it has restructured its work and expects to make significant productivity gains.

8.165 In the Commission's view the examples of the South Australian PCA and the Victorian Ombudsman's office demonstrate that the Commission's anticipated budget of 3 to 4 million dollars for the NIIC is feasible as an initial estimate. The NIIC would be dealing with considerably fewer complaints than the South Australian PCA and dramatically so in comparison with the Victorian Ombudsman. However, the Commission would estimate that the NIIC's complaints budget would be greater than that of the South Australian PCA and the Victorian Ombudsman.

8.166 These comparisons with the South Australian and Victorian systems also suggest that the Commonwealth Ombudsman's office in dealing with complaints against the AFP has performed less satisfactorily than those two agencies when measured against their workload, staffing and budget.

8.167 While the Commission agrees that investigating corruption can be extremely resource intensive the number of such matters that will require extensive surveillance is likely to be very few in number and in respect of those matters the NIIC's actual expenditure will not be meeting that total cost. The NIIC will not be acquiring its own surveillance equipment because it will be making use of AFP equipment and resources and where necessary or appropriate having access to other investigative resources from other Australian law enforcement agencies. The NIIC will not need a large permanent number of investigators sufficient to carry out every function and aspect of each corruption investigation that might possibly arise. It will have a core of experienced and capable investigators who will be able where necessary to lead and supervise investigations.

The NIIC would make judgments about the level and nature of NIIC, AFP and NCA input required for a particular investigation.

## **Some other suggested alternatives to the NIIC**

### ***A legislative code on AFP and NCA for providing information and reporting***

8.168 One suggestion discussed in a meeting with the Commission's consultants is that there could be a legislative code that required the AFP Commissioner and the NCA Chairperson to provide to the Ombudsman or the Attorney-General

- a report on any evidence of corruption or serious criminality
- information about the agencies' internal audits of their complaints and corruption and anti-fraud policies and implementation, for example, in Annual Reports.

8.169 ***Commission's response.*** The Commission is recommending that there should be clear reporting obligations to the NIIC in relation to corruption and criminality. This is an essential requirement. However, reporting by itself would not provide any proactive element or continuous external review which the establishment of the NIIC would achieve. A report based on internal auditing would rely on the quality and depth of the agencies' information and could not ask the fundamental questions necessary about implementation of appropriate measures. The history and experience of law enforcement agencies' shows that external review is necessary to ensure public confidence and effective responses to complaints and corruption. This is further discussed in chapter 9.

### ***Relying on the criminal law process to deal with corruption and criminality***

8.170 One of the Commission's consultants believed that in the case of the NCA a completely internal complaints model would be sufficient on the basis that the ordinary process of the criminal law would be an effective response to serious complaints and allegations of corruption. The AFP would investigate such matters, the DPP would prosecute them and the courts would determine liability.

8.171 ***Commission's response.*** This is clearly defective as the only investigative input would be by the AFP itself. There would be no external oversight. It would not satisfy public confidence. The DPP is not an investigative agency. It can only comment on the investigations carried out by others. A reliance on this legalistic approach would provide no rigorous external input at the crucial investigative stage, nor would it provide any proactive input. The limitations of this view are supported by the Western Australian Director of Public Prosecutions (DPP) who advised the Western Australian Premier that his Office was not the appropriate body to supervise the police force.<sup>311</sup> The DPP argued that there are sound reasons to preserve the difference between the prosecuting and the investigating functions of the Government. A structure that would enhance accountability by providing for both general and random audits of police operations was necessary.

8.172 The NIIC would provide those suggested elements. It would carry out itself or supervise corruption or serious criminality investigations. It would also audit and review AFP and NCA anti-corruption and anti-fraud plans and their implementation.

### ***NCA and AFP to investigate each other***

8.173 Another suggestion is that the NCA could investigate or oversight complaints against the AFP while the AFP could do the same in relation to the NCA.

8.174 ***Commission's response.*** In the Commission's view this approach is fundamentally flawed. The AFP and the NCA have significant links with each other in operations and goals. The NCA has a large number of AFP seconded officers. It would be difficult to ensure that any investigation was suitably independent. Consequently the arrangement would lack credibility with the public. The task of investigating each others complaints and corruption would also be likely to interfere with each's normal operations. Moreover the

NCA is not an investigative body in the same way that the AFP is. The NCA has a greater element in its role of gathering and assessing criminal intelligence. It would have difficulties in providing sufficient investigative experience and resources.

## 9. Reasons for establishing the NIIC

### Introduction

9.1 This chapter expands on the arguments put forward in the DRP for the establishment of the NIIC as the single external agency for investigating complaints and corruption against the AFP and the NCA.

9.2 The Commission considers that the NIIC as proposed in this report is the best and most cost effective response to AFP and NCA complaints and corruption. It constitutes a 'best practice' response. The Commission is in fact recommending a body that will effectively perform the functions that the Ombudsman's office in the case of AFP complaints was intended to perform. The NIIC would ensure that the objectives of the complaints systems are achieved.

9.3 In developing its proposals for the NIIC the Commission has considered a wide range of Australian and overseas developments and experiences. It has also carefully considered the submissions it has received and the views expressed to it in consultations it conducted. The Commission has considered not only the current position but also likely future developments and demands. The Commission believes that one of the clearest but often unheeded messages from a review of this information and research is the danger and the ultimate waste of resources and opportunities that follows from only making significant changes to police complaints and corruption policies and approaches after public revelations of significant systemic misconduct.

9.4 In maintaining its support for the establishment of the NIIC the Commission has carefully considered every other option that has been put to it. In the case of the AFP the major alternative suggested has been to enhance the role of the Commonwealth Ombudsman. In the case of the NCA the two alternatives are the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security. Those options are analysed in detail in chapters 4 and 5. The conclusion reached in those discussions is that they are fundamentally inappropriate for the tasks.

### How should the NIIC be characterised?

9.5 The Chairperson of the NCA probably summarised the views of those who doubt the need for the NIIC when he commented that from where he sits the 'proposed solution has all the appearance of a sledgehammer cracking a nut.'<sup>1312</sup> This is intended to mean that the NIIC is too elaborate and too costly when compared to the size of the problem, that is, AFP and NCA misconduct and corruption.

9.6 The Commission considers that this is an inappropriate metaphor because it

- undervalues the importance of the AFP's and NCA's integrity and accountability, particularly in terms of these agencies' public credibility
- underestimates the inherent difficulties in achieving and maintaining AFP and NCA integrity and accountability and
- misconstrues the nature of the NIIC, particularly its measured response to complaints and corruption investigations and the appropriate balance that it would achieve between internal and external input.

9.7 This chapter is concerned with highlighting each of those three points. The NIIC is not a sledgehammer; nor is AFP or NCA misconduct a 'nut'. The latter in fact is not static and could not be so in the future even with appropriate measures in place to secure integrity and accountability. Misconduct and corruption are dynamic and may change as law enforcement environments, government policy, the law and community values change. The AFP and the NCA are not immobile or hermetically sealed organisations. There is an enormous difference between describing law enforcement agencies as being essentially conservative and describing them as static. In many cases law enforcement agencies must deal with significant legal, political and social change both from within and externally and may try to respond by attempting to adapt those changes to fit their existing views and objectives.

9.8 The Commission believes that a more apt metaphor to characterise the role of the NIIC is a health model, particularly one relating to a person with a special vulnerability to an illness. The NIIC would provide the AFP and the NCA with an inoculation against systemic or widespread misconduct and corruption. It would also provide constant monitoring of the health of the organisation and full regular checks. It would also assist the agency in implementing effective preventive measures.

## **The potential variety and sensitivity of matters relating to the AFP and NCA**

9.9 Chapter 5 discussed a number of case studies to demonstrate the range and depth of complaints and questions about the NCA and how the NIIC would be able to provide the best response. This chapter discusses this matter more generally and discusses some specific cases in relation to the AFP.

9.10 Both the AFP and the NCA are involved in complex and sensitive operations. These operations may involve significant economic, social and political issues and the civil liberties of individuals and groups. Challenges and complaints about AFP and NCA activities are inevitable. Complaints or challenges may concern

- murder, grievous bodily harm, assault and other aspects of excessive force
- the unauthorised use of powers and discretions, including the NCA's coercive powers or AFP search warrants and telephonic interceptions
- unauthorised access or disclosure of information
- corruption including taking bribes or doing favours, selling drugs or weapons or money laundering
- obstructing the course of justice, by fabricating evidence or committing perjury
- rape, sexual assault or sexual harassment
- acting with political bias or nepotism.

9.11 Some complaints will have substance while others will not. A few will be deliberately false and others will be misconceived or made without the benefit of access to all the facts. No matter what category, if there is not an effective external scrutiny and review of these claims, then complainants may be left in doubt and in the case of high profile matters there will be public doubt. These doubts can accumulate and feed off each other. If there is a succession of these types of matters then the very existence and viability of the agency itself can be the subject of speculation or even put in jeopardy. The NIIC would not only be providing a valuable service when it identifies and deals with misconduct but also when it can report that a complaint or allegation is unfounded or lacking in substance.

9.12 The test of integrity and accountability is not merely dependent on the actual level of misconduct or corruption at any time. It is primarily linked to public perception. It will rarely be a satisfactory answer to these public controversies to blame the media for sensationalism or for inaccurate reporting, whether that may be true or not. The Commission is not suggesting that the NIIC would automatically launch a full scale investigation or inquiry into a matter simply because it receives public or media attention. It would be a matter for the NIIC to determine what response, if any, is necessary. However, there is no doubt that for serious matters that appear to have some substance the best answer will be to have an effective and independent body examine the matter and determine the appropriate investigation or response. The following case studies relating to the AFP demonstrate how these factors may mix.

### ***The Harrison inquiry***

9.13 The Harrison inquiry has been asked to examine a number of allegations and complaints about the AFP. On the television program '60 Minutes' on 24 March 1996 former Detective Sergeant Alan Taciak made admissions about his own corrupt activities and claimed to be aware of 78 other AFP officers who were

corrupt. The Producers of '60 Minutes' provided the Attorney-General's Department with 9 boxes of material and tapes relating to the interview.

9.14 An interviewing team consisting of representatives of the AFP and the Ombudsman interviewed Mr Taciak. The interview was taped and a transcript produced. The allegations involve former Federal Narcotics Bureau (FNB)<sup>313</sup> members and former and serving AFP members in such matters as

- corrupt activities including fabrication of evidence and acceptance of bribes
- other criminal acts including theft, illicit drug use and assault
- improper conduct and
- exploitation of deficiencies in FNB/AFP administrative practices and procedures to remove drugs or property for personal use or sale.

9.15 The terms of reference also require Mr Harrison to review and report on associated practices and procedures used by the AFP which may be deficient or may have contributed to or facilitated the existence of corrupt practices.

9.16 Mr Harrison has another Sydney barrister, Mr James Bennett, assisting him and two Tasmanian Police officers. It is instructive that the Ombudsman is not conducting this inquiry. The reasons for this seem apparent. In the Commission's view the Ombudsman has neither the resources nor expertise to do so. The Commission considers that the Harrison inquiry would not have been necessary if the NIIC had been operational. It would have examined Mr Taciak's claims with the potential if warranted to conduct investigations and hearings with royal commission powers.

### ***Operation Wallah***

9.17 In 1994 the CJC took over an investigation from the Queensland Police Service into organised prostitution on the Gold Coast. It codenamed the investigation 'Operation Wallah'. At one of its investigative hearings a number of prostitutes said on oath that a federal politician identified as the then Senator Graham Richardson was a client and that two businesspersons, possibly with criminal connections, were procuring prostitutes for Senator Richardson. The CJC considered that there was sufficient material about the possibility of these persons having criminal connections to pass the information on to the AFP which commenced an investigation into whether there had been any breaches of Commonwealth law. Details of the activities of the CJC and the AFP in the investigation were printed in the media. The disclosure of this information was unauthorised. Mr RV Hanson QC was asked by the CJC to conduct an investigation into whether any CJC personnel, any member or staff of the CJC Parliamentary Committee, or any Queensland Police Service officer had leaked the information.

9.18 The AFP investigation and report found no evidence of any breach of Commonwealth law. Senator Richardson refused to discuss one of the business people allegedly involved and denied that the other had supplied him with prostitutes.

9.19 The case was complicated by concerns expressed by officers of the CJC that the AFP was proceeding far too slowly in the investigation. The CJC made specific complaints to the AFP to that effect. Media reports suggested that there were concerns that the AFP investigation and report was inadequate and biased. An article in the Courier Mail suggested that the AFP investigation and report was a 'whitewash'.

9.20 Mr Hanson found that there could not be any criticism of the AFP investigation for failing to explore all avenues. Nor did he consider that the AFP investigation was unduly slow. However, he believed that the AFP took a slightly narrow approach by apparently regarding the CJC report as a complaint rather than as a source of information for an investigation into whether a federal Minister had been supplied with prostitutes by men with possible criminal connections. Mr Hanson also suggested that the AFP's final report did not seem to deal with the fact that there was sworn evidence from the prostitutes that supported the proposition that one of the businesspersons had supplied Senator Richardson with prostitutes.

9.21 If the NIIC had been in place it would be reasonable to expect that it would have monitored this investigation as it was clearly a high profile matter with potential political sensitivities. The CJC could have expressed its concerns to the NIIC. If Senator Richardson or any other person involved in the investigation had a complaint the matter could have been raised with the NIIC. Any media allegations of a 'whitewash' could have been met by the response of the NIIC undertaking an inquiry into the investigation and conduct of the AFP.

### ***Other current allegations about AFP officers***

9.22 There has also been comment in the media about a group of AFP officers known as the 'Three Little Pigs', who according to an allegation from a former ACT sex worker, used to frequent ACT brothels. They were allegedly paid in cash and sexual favours not to close the brothels. It is also alleged that these officers are now of senior rank in the AFP.<sup>314</sup> Ms J Saunders, an ACT Legal Aid lawyer has also claimed that a number of legal aid clients have been assaulted by AFP police, that there has been fabrication of evidence such as 'verballing', and that drugs have been 'lost' by the AFP.<sup>315</sup>

9.23 Some or all of these allegations may be pursued by the Harrison inquiry. They also illustrate the variety of allegations that are made and the value of having an agency such as the NIIC ready to consider them and take appropriate action.

## **Major advantages of the NIIC**

### ***Achieving objectives***

9.24 The Commission is strongly of the view that the NIIC would best achieve the major objectives of law enforcement complaints systems identified in chapter 2. In summary the NIIC would best achieve those objectives because it would provide an integrated, balanced and comprehensive response to AFP and NCA complaints and corruption matters. It would streamline administrative arrangements. It would clearly be at the apex of the complaints systems for the AFP and the NCA. The system would be holistic and avoid the fragmentation and divided responsibility under the current system. The great strength of the NIIC is that it would be an external auditor of the integrity and accountability of the AFP and NCA.

### ***An auditor of the law enforcement agency's performance***

9.25 The NIIC would provide an audit of the AFP and NCA's performance in relation to complaints and anti-corruption measures. It would ensure best practice and a pro-active stance to prevent, identify or deter potential misconduct before it occurs.

9.26 The Council for Civil Liberties submitted that one of the most serious problems of Australian policing prior to the establishment of bodies like the CJC was that it fell principally to the police services around the country to analyse their own track record.<sup>316</sup> For example, after the Lusher report on the NSW Police Service both NSW Police Commissioners Avery and Lauer argued that corruption in NSW had been dealt an effective blow. Clearly the NSW Royal Commission shows those assertions to be utterly without foundation.

9.27 Relying on law enforcement agencies to gauge their own effectiveness has been recognised as a common problem. Skolnick and Bayley identified six main factors that inhibit innovation and change within policing

- the pull of tradition
- substantial segments of the public who do not want the police to change
- scepticism by unions
- costs
- a lack of apparent vision on the part of police executives

- and the incapacity of police departments to evaluate their own effectiveness.<sup>317</sup>

9.28 The NSW Royal Commission commented that, if anything has been learned from the histories of inquiries into the NSW Police including the Moffitt and Lusher inquiries of the 1970's and 1980s to the more recent ICAC inquiries, it is that simple public disclosure of serious misconduct and corruption accompanied by policy recommendations specific to the matters unearthed, will not guarantee any long term remedy.

9.29 In the Commission's view what is needed to guarantee a long term remedy is not only a system of internal reforms and policies that continue to improve the agencies' cultures but the assistance of external oversight to provide independent and effective monitoring of progress. There must be continuing vigilance to achieve the goals of integrity and accountability.

9.30 The Commission considers that the Ombudsman, even with enhanced powers and additional resources, would be unable to perform this broad auditing function. To achieve a proper and continuous audit requires all the following elements that the NIIC would be established to provide

- the capacity to conduct by itself the full range of investigations including into serious criminality and corruption with the use of coercive powers and extensive surveillance
- a capacity to brief the DPP where appropriate
- a criminal intelligence database
- a policy and research unit that has expertise in law enforcement strategies and trends and statistical analysis
- the capacity and expertise to audit and review law enforcement anti-fraud and anti-corruption plans

9.31 The Ombudsman does not have any of these elements and for her office to try to develop them into a co-ordinated unit would be to move far beyond what an Ombudsman does. For the Commonwealth Ombudsman to even try to achieve it would inevitably create tension with the remainder of her very broad jurisdiction which would be completely different in focus. It would, in the words of the NSW Royal Commission into Police, 'subvert' her 'supervisory function'. Law enforcement agencies are special cases that need 'specialised review mechanisms'.<sup>318</sup>

9.32 Even if the Commission was satisfied that the Commonwealth Ombudsman's performance in the AFP police complaints area had been first rate the Commission would still recommend a separate and focused external body with the powers and role of the NIIC. However, as has been noted, the Commission believes that the Ombudsman's performance in that area has overall been unsatisfactory. To give the Ombudsman additional resources in those circumstances, and where the pressure on the other parts of her increasing jurisdiction is becoming greater, would be a course fraught with risk. In contrast to the Ombudsman's current role, and in contrast to the inherent limitations of the role that her office could perform, the NIIC first and foremost would be an active investigator.

### ***The NIIC to be an active investigator***

9.33 One of the greatest weaknesses of many current complaints systems is the relative passivity of the external complaints investigator. This point has been made in relation to Australia and overseas.

9.34 The external agency must not rely on paper reviews of internal investigations. A former NSW Ombudsman described the then NSW police complaints system that relied on paper review as a 'dangerous charade likely to deceive members of the public that there is a watchdog or guardian with effective powers when there is not'.<sup>319</sup>

9.35 The lack of independence in British complaints systems has come under much scrutiny. In particular many have expressed concern over the very low number of complaints which are selected for oversight by

the PCA.<sup>320</sup> The recent study of the Toronto police complaints system also highlights the problems that a passive external investigator has in ensuring public confidence.

9.36 The external agency must be an active body by

- conducting its own motion inquiries and investigations
- selecting complaint or corruption matters that it must investigate itself
- providing appropriate levels of management and supervision of internal investigations.

9.37 The power to initiate an inquiry or action or carry out the first investigation should not be limited to rare occurrences or very unusual circumstances. The Commission considers that in the context of the AFP and NCA, the NIIC must have the capacity and resources to investigate completely by itself some 40 to 50 matters per year. In those cases where the law enforcement agency is given a role in the investigation the external input must still be effective. For example, Maguire and Corbett have argued that external supervision can work to reduce the frequency of police attempting to persuade complainants to withdraw and improve the quality, speed and thoroughness of investigations. The following comment was made in relation to the Toronto police complaints system.

Perhaps the most salient feature in the minds of complainants remains the fact that the police investigate the police. While this is itself a great source of concern, complainants are additionally dissatisfied with particular aspects of the investigations which could, at least to some extent, over-ride any lack of confidence in the investigation. Concerns over not listening to their side of the story, narrowly focusing on documentary evidence and physical evidence, giving too much weight to the subject officers' version of events and not enough to that of the complainant or the complainants' witnesses, could be more satisfactorily addressed within the current legislative framework.

9.38 The NIIC will have the powers and resources to manage and supervise internal investigations. It will be able to sample, quality test and probe. This must be a continuous process with regular feedback and where necessary corrective advice and instruction to the AFP and the NCA.

### ***Meeting specific objectives***

9.39 In particular the NIIC would best achieve the following primary objectives

- increasing public confidence in the integrity and accountability of the AFP and the NCA
- efficiently using and co-ordinating existing resources including providing the appropriate level of investigation of complaints and corruption
- assisting those organisations to respond effectively at a management level to complaints and corruption.

9.40 ***Increasing public confidence.*** The NIIC would best ensure public confidence because it would have the focus, powers and capacity to re-assure the public that there was effective scrutiny of the AFP and NCA. The NIIC would provide an appropriate balance between internal and external input into the investigation of complaints and corruption. As noted in chapter 2 attaining the right balance between those two is the fundamental issue in this inquiry both for the investigation of complaints and corruption and the imposition of discipline.

9.41 The Commission has explained why the AFP and the NCA must continue to play a significant role in the handling and investigation of complaints made against each respectively. The major reason is that they must exercise managerial responsibility for the range of complaints that concern them. However, their input must be subject to appropriate levels of direct management, case management guidelines and standards. The NIIC should conduct random surveys and audits of investigations where the AFP or the NCA has primary carriage. In some cases this could involve the NIIC carrying out a full re-investigation as a quality control.

9.42 The NIIC should take measures to explain to the public and individual complaints why the AFP and the NCA should continue to play a significant role in their complaints and corruption investigations. A

complainant should be advised about the level of NIIC, AFP and/or NCA participation in the investigation and resolution of his or her complaint.

9.43 ***Measured response to complaints and corruption.*** The NIIC would provide a measured response to complaints and corruption including the appropriate level of internal and external input into investigations. For the more serious end of corruption and criminality or cases of special public interest the NIIC could conduct the investigation totally externally from the subject agency. For other cases it might directly supervise the investigation or rely on agreed upon standards and guidelines. It always would have the power to take over an investigation itself or to change the process. The NIIC's operations would be calculated and surgical and not a sledgehammer to crack a nut.

9.44 ***Assisting AFP and NCA managements.*** The NIIC would have access to the complete flow of information about complaints and corruption to enable it to provide comprehensive responses to individual complaints but also to clearly identify trends and issues of policy and procedure. The NIIC would have a specialist policy and research function to provide that service.

## **Costs**

9.45 In chapter 8 the Commission examined issues raised about costs. It was argued in that chapter that the Ombudsman was not the more cost effective response because the Ombudsman would be unable to perform all the necessary functions of the external agency. In any event the existing infrastructure of the Ombudsman would not form the basis for any significant savings.

9.46 The NIIC as envisaged and proposed by the Commission is a lean body specially developed to achieve the core objectives. There would be no excess bureaucracy. The budget would take into account changing needs (such as the number and complexity of corruption investigations) to ensure that only the appropriate resources are used to achieve the objectives. The NIIC would be a 'hands on' investigator as the Commission would expect that the NIIC Chairperson would be conducting hearings and the Commissioner for Complaints would have direct involvement in some complaints investigations.

9.47 In the Commission's view the cost of establishing the NIIC would not be prohibitive or excessive and the Commission has yet to receive any direct evidence that it would cost more than the initial estimate of about 3 to 4 million dollars or that a significant contribution to that amount would not derive from efficiencies from an audit of the current system. However, the Commission is concerned that the merits of the NIIC should not be obfuscated by arguments at this stage about exactly what it would cost. The Commission considers that the fundamental point is that the NIIC constitutes the best possible response including cost effectiveness and that any additional spending would not be excessive and would be a modest amount to pay for a system that will achieve very crucial public policy goals. The importance of those goals is shown in this chapter. The Inspector-General of Security and Intelligence made the following apt comment.

I appreciate that the resource implications of the establishment of a new body will be a consideration. That is a proper role for Government. Bearing in mind the high community costs already incurred in the law enforcement function, the costs of establishing a new body to independently examine corruption-related allegations, is a small price to pay. Indeed it is an investment, rather than a cost, if in the longer run it improves community confidence and helps to maintain higher standards of integrity and ethical conduct in the policing bodies.<sup>321</sup>

9.48 Another major point to consider is that estimates of what the current systems cost should take into account the very significant expenditure on special inquiries and reviews that have occurred in relation to both the AFP and the NCA. In the Commission's view these inquiries and reviews would have either been unnecessary with the NIIC operating or would have been carried out by it.

## **The paramount need for law enforcement integrity and accountability**

9.49 The rest of this chapter discusses the importance of the AFP and NCA's integrity and accountability and the inherent and constant difficulties in achieving and maintaining them. In summary, law enforcement officers are in a special position of trust and responsibility with the community because of their capacity to use force, the wide scope for the exercise of individual discretion from officers even low in rank, the

significant potential for misconduct or corruption and the difficulties in proving misconduct. They are in this special position of trust when compared to the majority of other occupations within the community. There is a vital public interest in ensuring that only people of high repute and performance remain in law enforcement agencies.

### ***The growing demand***

9.50 There is a growing international concern for ensuring the integrity and accountability of police agencies.<sup>322</sup> One commentator has suggested that the following factors have led to this increasing public scrutiny

- greater awareness of ethical and cultural diversity
- increasing media scrutiny of police activity
- 'incidents' or major scandals
- racial and ethnic sensitivity
- declining trust of the police by some segments of the community
- greater occupational professionalism by the police
- technological changes
- shifts in the focus of academic enquiry.<sup>323</sup>

9.51 The Commission would add to this list the growing demand that all public institutions be accountable and efficient. The context in which civil liberties are discussed today has changed significantly over the last 20 years. Concerns about human rights routinely feature prominently in almost every aspect of international activity, particularly in relation to treaties and covenants. This can be characterised as a concern to protect and promote the rights of citizens claimable against their respective States. The institutions of the State are now more clearly seen as being there to serve the needs and meet the demands of citizens, not the other way around. In line with these changes significant developments in Australian domestic law have occurred over the past two decades.

9.52 At the Commonwealth level, a structured, statutory mechanism for judicial review of administrative action has been in operation for almost 20 years. Tribunals have been established to assist in the review of administrative decisions. Ombudsmen now exist at both State and Commonwealth levels and in respect of a range of functions. Equality and anti-discrimination legislation has been introduced in the States, Territories and the Commonwealth and these are backed by anti-discrimination boards and equal opportunity commissions including at a national level the Commonwealth's Human Rights and Equal Opportunities Commission.

9.53 Such initiatives have altered the nature of the relationship between State and citizen; the citizen's expectations of the State are now broader and more exacting. The mechanisms by which the organs of the State are made accountable, both collectively and individually, have come under increasing scrutiny and in consequence, they have had to become more transparent and responsive.

### ***Public confidence crucial***

9.54 The crucial importance of the public having confidence in its law enforcement agencies is widely acknowledged. These agencies need the public to be supportive and to be willing to act as

- sources of information, for example in investigating or preventing crime
- witnesses

- informed and impartial jurors
- citizens who generally understand the role of law enforcement agencies and who provide support for their activities.<sup>324</sup>

9.55 Without public confidence and credibility the notion of 'community policing' is mere rhetoric. The importance of public confidence has long been recognised but has become increasingly difficult to win. Sir Robert Peel said

The power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour; and on their ability to secure and maintain public respect.<sup>325</sup>

9.56 The current AFP Commissioner has publicly acknowledged the fundamental importance of public confidence in the AFP. The PJC on the NCA has emphasised the significance of public confidence for the NCA.

The committee believes that it is vital that the integrity of the NCA is upheld if it is to maintain the confidence of the Australian people. This means that there should be a satisfactory and transparent system for investigating or handling complaints against it.<sup>326</sup>

### ***Public confidence lacking***

9.57 While it is acknowledged that public confidence is crucial the evidence strongly suggests that public confidence in most current law enforcement complaints systems, particularly where the agency itself is responsible for the investigation and control of the system, is lacking at every facet of the process: that is, lodging, recording, investigating and determining the complaint.<sup>327</sup>

9.58 ***Research on AFP complaints system.*** The Commonwealth Ombudsman engaged AGB McNair to conduct an annual client satisfaction survey of complainants against police. Of the survey group 27% perceived the outcome to be substantially or partly in favour of the complainant, 22% were satisfied with the final decision, 59% thought the final decision was *not* reasonable, 66% perceived the time taken for the resolution of the complaint was too long, 32% considered that useful information or advice was provided to them, and 56% considered that the reasons for the final decision were *not* clear. The response rate to the survey was 16% (compared with a response rate of 30% for all complainants to the Ombudsman in her different jurisdictions). This study indicates that complainants have little confidence in the current AFP complaints system.

9.59 ***England.*** The English survey evidence paints a similar picture. Maguire and Corbett's survey of 1000 complainants found 74% were dissatisfied with the outcome of the complaint and most of these were very dissatisfied.<sup>328</sup> In cases serious enough to have been referred to the English PCA for possible supervision, Maguire and Corbett made the following comments:

Among the whole group, expectations of a fair and thorough investigation had been generally low at the outset. Moreover, among the minority who had started out in a reasonably optimistic frame of mind, nearly two-thirds finished up dissatisfied with the way the investigation had been conducted. Altogether, over half of the sample declared themselves 'very dissatisfied' and a further quarter 'fairly dissatisfied' in this respect.<sup>329</sup>

9.60 After discussing the rather scant evidence on this question Maguire and Corbett concluded that their best guess was that at least one in three people who make a definite attempt to complain were dissuaded for good or bad reason from so doing by the police but that the proportion varies widely between forces and between individual police stations.<sup>330</sup> Bona fide reasons for dissuasion may be that middle ranking police may explain the police action or offer an apology or say that they will speak to the relevant officer.

9.61 Lord Scarman in his report on the Brixton Disorders in 1981 stated that

I have indeed received considerable evidence of a lack of confidence in the impartiality and fairness of the [complaints] procedure, not only among members of the ethnic minority communities but generally. It has been suggested to me that because of this lack of confidence, there is a widespread reluctance to lodge complaints. People, it is said, do not believe that their complaint will be investigated or judged fairly, and they are worried that if they do

complain they will subsequently be subjected to harassment and intimidation by the police. The chief criticisms centre on the fact that under the present system the police investigate themselves.<sup>331</sup>

The National Council for Civil Liberties (UK) also raised many concerns with the police complaints procedure in England at the time.<sup>332</sup> They quoted the view of the English Police Federation in 1982:

There appears to be no way in which the public will be convinced of the fairness of the system so long as the police appear to be judges in their own cause.<sup>333</sup>

9.62 *Canada*. A recent study of the Toronto complaints system suggested that public confidence in the investigative process was so low that many victims of police misconduct considered it 'a waste of time' to complain.<sup>334</sup>

### *Submissions and consultations*

9.63 The Commission's consultations and submissions received highlighted public scepticism of any complaints and corruption systems that essentially rely on the agencies investigating themselves. People generally expect a high degree of accountability from their law enforcement agencies. The public is now better informed and demanding more from its police forces.<sup>335</sup>

9.64 Many people consulted emphasised the need for investigations independent of the police.<sup>336</sup> A frequent comment was that police should not investigate themselves.<sup>337</sup> The NSW Royal Commission into Police was frequently mentioned as supporting that view. A number of those consulted suggested that the NSW Royal Commission demonstrated the need for a vigorous complaints system that did not rely on police investigating themselves.

9.65 The system had to provide real accountability.<sup>338</sup> There was a lack of faith in internal investigations. For example, the Department of Environment Sport and Territories commented that in its discussion with members of the Jervis Bay community in relation to this inquiry a number of people expressed little faith in a system that relied on internal investigations.<sup>339</sup> What was needed was a permanent body to oversight with the same status and powers of a royal commission.<sup>340</sup>

9.66 Members of the Western Australian Parliamentary Commissioners Office consulted by the Commission expressed the view that there was a strong undercurrent of feeling in Western Australia that police should not investigate complaints against themselves.<sup>341</sup> This feeling had particularly surfaced in response to the Royal Commission into Deaths in Custody.

9.67 Youth Workers from the Hobart City Council told the Commission that young people would certainly regard the police complaints system as more credible if the police did not investigate themselves.<sup>342</sup>

### *Trend to greater external review*

9.68 In response to the clear lack of public confidence in law enforcement complaints systems there has been a growing trend to greater levels of external review. This is a discernible trend in countries with comparable legal systems to Australia such as New Zealand, England, Northern Ireland, Wales, Canada and the United States.<sup>343</sup>

9.69 It is also a trend within Australian jurisdictions. Queensland has had the CJC since 1990. The NSW Royal Commission into Police has recommended a system that increases external input into the investigation of complaints and corruption. The Commission was told in its consultations with the Tasmanian Ombudsman and the South Australian PCA that each wanted to increase their investigative role and input. There was an increasing discussion about giving the Tasmanian Ombudsman a greater role in monitoring police complaints including:

- being notified of every complaint
- being able to receive complaints

- overviewing investigations including commenting on appropriate investigators and
- being able to re-investigate.<sup>344</sup>

9.70 The office of the South Australian Police Complaints Authority has highlighted the issue of under-resourcing in the South Australian jurisdiction as an impediment to providing effective scrutiny and would like to increase the number and range of matters that the PCA investigates from the beginning or in the nature of re-investigation.<sup>345</sup> This would require a build-up of the investigative capacity of the PCA.

### ***Denmark***

9.71 Denmark provides an example of a country that has moved to increase the level of external review of police complaints without any evidence at all of significant police misconduct or corruption.<sup>346</sup> It increased the level of external scrutiny in response to the public's lack of confidence in the largely internal investigation system. Until very recently, the police complaints system in Denmark was an internal investigation and adjudicatory system with an external Review Board to ensure that complaints are investigated properly. This system was recently reviewed following a number of criticisms concerning the public's apparent lack of confidence in the effectiveness and fairness of the police investigating themselves.<sup>347</sup>

9.72 In accordance with that review a new system came into force on 1 January 1996. The DPP is now the authority which investigates complaints and the external supervising body is a Police Complaints Board (PCB). The DPP will as far as possible carry out the whole investigation by using teams of lawyers. The new system is designed to be more accessible and comprehensible to the public and to provide greater external review.

## **Special difficulties in achieving and maintaining integrity and accountability**

9.73 There are a number of special and significant difficulties in achieving and maintaining the integrity and accountability of law enforcement agencies. A fundamental problem is the impediments provided by the negative aspects of police cultures. This is recognised as a major problem internationally and within Australia.

### ***Negative aspects of law enforcement cultures***

9.74 Every organisation has its own culture and sometimes there are competing cultures. Police culture describes the operation of informal rules that prescribe or modify police behaviour and will affect police attitudes to defining and dealing with misconduct.

9.75 Police culture has been said to be an understandable consequence of the nature of police work and the conflicting public expectations which are associated with policing. Police culture tends to be very inclusive and closed to the outside world.

In the closed society of police departments ... the pressure to remain loyal is enormous ... having subsumed their individual identities into the whole, cops know that betraying the group betrays themselves and destroys their identities. [Police] live in a world of desperately conflicting imperatives, where norms of loyalty wash up against standards of law and order. So mostly ... they see, hear, and speak no evil ... [but] special efforts can and must be made to overcome these powerful prescriptions of silence and loyalty in the culture of policing.<sup>348</sup>

9.76 While these powerful, cohesive ties may be very valuable in some situations, such as in the conduct of operations, they often have negative consequences for law enforcement accountability and for responses to complaints.

9.77 Police cultures are often regarded as defensive and antagonistic towards complainants and their complaints. Police will protect each other and reinforce the informal rules in the face of perceived external and internal challenges. The overwhelming evidence and research from within Australia and outside is that police cultures have significant negative aspects such as

- hostility or indifference to complainants
- codes of silence including a reluctance to 'dob in' colleagues
- victimisation of whistleblowers and stereotyping of minority groups.

9.78 One London study on the basis of observing operational police work concluded that police officers will normally tell lies to prevent another officer from being disciplined or prosecuted.<sup>349</sup> A commentary on the American experience made similar points.<sup>350</sup> According to this commentary American police officers will rarely complain or give evidence about another's brutality or corruption.<sup>351</sup> If an officer does come forward with a complaint of brutality or corruption by a fellow officer, he or she is shunned and the entire police force closes ranks in silence and denial.<sup>352</sup>

9.79 The pervasive influence of a defensive or antagonistic police culture has greatly contributed to doubts about the effectiveness of complaints systems that rely on police control of complaints investigations. Codes of silence are recognised as difficulties in law enforcement cultures around the world.

9.80 These 'negative' police cultures can permeate the entire organisation or can prevent relevant information from being received by senior management. There are clear examples of the gross failures in accountability that can develop. The NSW Royal Commission into the Police commented that the NSW Police senior management appeared to be unaware of the extent of the problem of serious misconduct in NSW or if aware, have failed to adequately respond to it.<sup>353</sup>

9.81 **Submissions and consultations.** The Commission's consultations and submissions received re-enforced the significance of the difficulties of negative police cultures. A number of submissions commented on the strength of a negative police culture and the propensity for corruption and its cover-up.<sup>354</sup> Police tended not to regard complaints, particularly at the minor level, as public relations matters. Police forces were still essentially conservative organisations and there was a great concern for avoiding loss of face.<sup>355</sup>

9.82 **The AFP's views.** The AFP in consultations suggested that the prevailing culture of the AFP is very different to that of other Australian police services. It did not believe that corruption in the AFP is systemic or widespread. The AFP culture does not regard corruption as being acceptable or clever. If a member is suspected of corruption or wrongdoing then other members will avoid that person for fear of being tainted by association. The AFP is a different organisation with a different history. The State police forces have historical links to corruption. On the other hand, the AFP is a very young organisation with a specific mandate. It has personnel coming to it from all over Australia. The tribal, insular mentality of some State police services is therefore absent. Finally, in its community policing role in the ACT the opportunities for corruption are more limited.

9.83 **Commission's response.** It is difficult to compare police cultures and the Commission is not in a position to assess the AFP's claim that the AFP culture is significantly better than some State police forces. The only study on the AFP culture that the Commission is aware of suggested that the AFP did have some significant problems with its culture. The Niland report dealt with the AFP culture in terms of its EEO policies. It did not deal with all aspects of the culture including AFP - community relationships and perceptions. It did not discuss external complaints against the AFP. However, it touched on responses to internal complaints and found:

- supervisors often do not have the skills to handle grievances
- the formal grievance system has no support and is widely regarded as cumbersome, lacking privacy safeguards and open to bias
- complainants are stigmatised.

9.84 The issue of the actual level of AFP misconduct and corruption is dealt with below. However, it is the Commission's view based on the evidence from Australia and overseas that the difficulties of police culture are intrinsic to the nature of law enforcement work. While it is necessary and worthwhile to take active

measures to 'open up' police cultures as discussed in chapter 13 these measures will not eradicate these difficulties.

9.85 The AFPA argument that the AFP is a young organisation is of course of ever diminishing weight as time goes by. The argument that Canberra is a small country town, and therefore the possibilities for corruption there are limited, is also not entirely persuasive. The ACT has a significant drug problem that is the subject of media attention and Parliamentary debate in the ACT Assembly. The ACT has prostitution and gambling. When compared to Sydney and Melbourne these potential areas for corruption may be of lesser magnitude but they do exist. Moreover, as discussed below the AFP in its national investigative role is faced with considerable potential for corruption and misconduct.

### ***Managerial difficulties***

9.86 Law enforcement agencies have tended to regard themselves and be regarded as paramilitary, hierarchical organisations with a reliance on a disciplinary rule book. This has hindered the growth of effective and modern managerial responsibility. Etter has summarised traditional police management as follows

[P]aramilitary organisations with authoritarian, top down, rule bound management styles and tall, hierarchical, closed organisational structures with an emphasis on internal and vertical communication.<sup>356</sup>

9.87 Policing agencies have tended to be anti-change and to have narrow, compartmentalised perspectives on corporate problems. Skolnick and Bayley commented

All organisations resist change, but one is hard pressed to think of any more resistant than the police.<sup>357</sup>

9.88 Another commentator argued that implementing change in policing was like 'bending granite'.<sup>358</sup> Police take pride in their ability to create and sustain a traditional image of themselves. Robinson has called police innovation a 'rare commodity'. There is a significant time lag between police adopting new ideas and other agencies doing so.<sup>359</sup> For example, management by objectives was 'old hat' before the police considered it and similarly the trend towards greater community involvement had been well established for years in many other agencies.<sup>360</sup> Innovations that do occur can often be attributed more to the vision and enthusiasm of key individuals rather than to any organisational encouragement. Often the stated policies and principles will be changed by the impetus of senior management but it is much more difficult to change the attitudes and work practices of the rest of the organisation.

9.89 A review of the South Australian Police conducted in 1994 reiterated the same message on the record of police incapacity to innovate successfully from within.

A number of important observations were made to the Review team. Perhaps the most significant, was the observation that change had only come about as a result of major problems in each of these States' Police Departments. It was not self generated. Change had invariably been imposed from outside and in the process, Police Departments had lost some of their autonomy... it seems that well structured, fundamental change which is self-motivated and self-directed is an elusive element for police organisations.<sup>361</sup>

9.90 Etter argues that these attitudes and organisational structures are beginning to change. However, she notes that Bayley in a 1990 study of Australian policing found that neither organisational structures nor personnel assignments had changed except in marginal ways in the past 20 years. She also notes that the AFP had implemented a policy of significant reform from 1990 which faced considerable impediments including suspicion of management initiated change, the complexity of industrial issues and a police culture that was not supportive of 'outsiders' and which perceived loss of security of tenure and reduced ranks as a serious threat.

9.91 Bayley argues that

Since the discipline system is supposed to prevent mistakes, police organisations repress knowledge of mistakes rather than learning from them. Mistakes prompt a single response: tighten discipline, punish individuals. If things go wrong it is never the organisation's fault - it is the fault of the working officer who failed to follow the rules.<sup>362</sup>

9.92 These views have contributed to the 'rotten apple theory'.<sup>363</sup> This theory is most applicable to situations where the police act as investigator, judge, jury and sentencer in matters relating to the conduct of other officers as there is often pressure within the police service to maintain the apparent integrity of the service at all costs.<sup>364</sup> This conflict of interest may culminate in the portrayal of a corrupt officer as a solitary instance of corruption rather than a symptom of a wider problem. In fact the opposite is true. The NSW ICAC has submitted that corruption is frequently a product of the culture of an organisation.<sup>365</sup>

9.93 Examples of ineffective police management allowing misconduct to breed are documented in many Australian and overseas inquiries (for example, Costigan, Fitzgerald, Wood and Mollen).<sup>366</sup> In some cases, such as Queensland and NSW, senior management itself may be involved in corruption. It can never be discounted as a possibility. High level corruption has catastrophic effects on the credibility and integrity of the agency. An effective external agency with broad powers is vital to help prevent that occurring or to detect it as quickly as possible.

9.94 The AFP has acknowledged the managerial defects of a paramilitary, closed organisation and is trying to remedy them within its own organisation. However, the nature of policing and the resilience of an antagonistic police culture mean that it is necessary to have an external agency with considerable powers and focus to monitor and assist law enforcement management in the area of accountability and integrity. This will not only improve the actual level of integrity and accountability but will also help to ensure public confidence in the law enforcement agencies. Effective civilian review will deflect unfounded criticism, isolate the persistently erring officer, strengthen the hand of middle-managers and attest to the good faith of the police.<sup>367</sup>

9.95 There may be some concern that an external civilian agency is unable to make judgments about the propriety of police actions or understand the nature of police work. The NIIC would have staff who have the appropriate backgrounds and skills to make these assessments. However, the issues involved should not be regarded as totally unique to the police. Civilians should be just as capable of making judgments about the propriety of police actions as they are in determining the guilt of defendants in criminal trials.<sup>368</sup> Lewis argues that civilian oversighting does not focus as much on the specialised technical aspects of police work as it does on its ethical dimensions.<sup>369</sup> She examined allegations received by the CJC over a three year period and found that ethical and not technical issues were the predominant concerns of the CJC.

### ***Problems with internal investigations***

9.96 The Ombudsman's limited review of the AFP's internal investigations has led her to cast doubt on the quality of IID investigations. Many other inquiries, both Australian and overseas, have cast doubt on the effectiveness and impartiality of internal investigations. There is a tendency for them to go 'soft' on officers and 'hard' on complainants and to attempt to dissuade complainants from following through on their legitimate complaints.

9.97 The performance of internal investigations has received considerable criticism in Australia.<sup>370</sup>

9.98 A succession of ad hoc royal commissions, commissions of inquiry and reports in Australia and overseas have exposed numerous examples of the failure of the police internal investigations process, particularly when there was no external, independent body to oversight the police.<sup>371</sup>

9.99 Criticisms usually concern inadequacy, bias or excessive delays. The prevailing police culture means that there are strong risks that they will not be able to conduct thorough and fair investigations.<sup>372</sup>

9.100 Police investigators, whether unconsciously or otherwise, will tend to be sceptical of complainants and will be 'softer' on the police concerned. This lack of investigative thoroughness and active bias on occasions may take a number of forms. The police may question the complainant and his or her witnesses very vigorously, looking for inconsistencies but 'hold back' with police the subject of complaint. They may provide false or misleading information to complainants, pressure complainants to withdraw, or show police under suspicion copies of other members' records of interview and give them the option of adopting them. They may also favour the accused police officer's case by selectively interviewing witnesses or by not taking all reasonable measures to identify or find witnesses favourable to the complainant.

9.101 A number of inquiries in Australia have discussed corrupt or inefficient police internal investigation units.

9.102 **Queensland.** The Fitzgerald report made these comments regarding the Queensland Internal Investigations Unit in 1989.<sup>373</sup>

The Internal Investigations sections have been woefully inefficient, hampered by a lack of staff and resources and crude techniques. It has lacked commitment and will, and demonstrated no initiative to detect serious crime. Corrupt police have effectively neutralised whatever prospect there might have been that allegations against police would have been properly investigated. The section's effects have been token, mere lip service to the need for the proper investigation of allegations of misconduct. The Internal Investigations Section has provided warm comfort to corrupt police. It has been a friendly, sympathetic protective and inept overseer. It must be abolished.<sup>374</sup>

9.103 While the CJC and a revitalised QPS have had a very significant impact on the quality of police internal investigations, problems still remain. Police investigations require effective supervision and quality testing. In its submission to the Bingham inquiry the CJC advised that it had reviewed a sample of 180 investigations conducted by the Queensland Police Service.<sup>375</sup> It found that 30 were 'inadequately investigated'. The CJC also stated that police investigators may sometimes not subject police officers to appropriate questioning, may not follow all productive leads and not secure all physical exhibits in a timely fashion.

9.104 **NSW.** The NSW Royal Commission into Police also found deficiencies in a number of significant NSW Police internal investigations.<sup>376</sup> It found a police culture where reporting misconduct was discouraged and where those who did so were ostracised and persecuted.<sup>377</sup> The Royal Commission made the following comments on the NSW complaints system:

Evidence to the Commission indicates that lack of confidence in internal investigations is still a significant problem. Although internal complaints are made, police are more willing to provide information on serious matters to an external body, as has been indicated by the flow of intelligence from serving police officers to the Ombudsman and to this Commission.<sup>378</sup>

9.105 The Commission noted the limitations of the NSW Police complaints model which relied on police internal investigations and oversight by the NSW Ombudsman.

9.106 Despite the presence of the Office of Professional Responsibility (OPR), the Independent Commission Against Corruption (ICAC), the New South Wales Crimes Commission (NSWCC), and the Office of the Ombudsman, a serious corruption problem and an unhealthy police culture have developed, neither of which is of recent duration.<sup>379</sup>

9.107 **Western Australia.** In June 1996 a Parliamentary Select Committee inquired into the operation and administration of the Western Australian Police Service including the role and performance of the police Internal Affairs Unit (IAU) that was developed to deal with police corruption and the Internal Investigations Branch which investigates complaints.<sup>380</sup>

9.108 The Committee examined a number of internal investigations and found several significant inadequacies. In relation to the IAU it commented that the extent of police corruption accumulated over several years, during the whole time in which the IAU was operating, brought into question the effectiveness of the police service's anti-corruption strategies. The IAU was under-resourced and understaffed. The Committee also argued that the IAU was hampered by: deliberate obstruction of its investigations; the deliberate leaking of information; by suspects being tipped off and undercover operatives being identified to their targets; and by an unwillingness, even of honest officers, to stand witness against their fellows.<sup>381</sup> According to the Committee, evidence presented by whistleblowers suggested 'a disturbing propensity of some senior officers to protect at any cost the reputation of the Service'.<sup>382</sup>

9.109 **Overseas.** These criticisms of internal investigations are not limited to Australia. The Fitzgerald inquiry reviewed overseas experiences and made the following comment on the problem of relying on police internal investigations:

To a large extent, attempts all over the world to combat police misconduct locally [ie internally] have revealed similar and recurrent problems: police culture, lack of effective control of internal investigative procedures, lack of

investigative resources, organisations and procedures which inhibit honest police and lack of public confidence in the Police Force's ability to investigate complaints against its members.<sup>383</sup>

9.110 **New York.** The Mollen Commission was established to investigate allegations of police corruption and the anti-corruption procedures of the New York Police Department. Its report made the following comment on the New York Police's Internal Affairs Division:

From the beginning of our enquiries, IAD investigators cooperating with the Commission told us that the work ethic in IAD was to close cases with as little effort as possible. Most IAD investigators, we were told, did nothing all day. One officer told us that they sit around and 'eat donuts and do crossword puzzles' - and the supervisors and commanders did little more. Indeed, the Commission conducted an anonymous survey of the work conditions and attitudes of IAD investigators which revealed that almost half of the IAD investigators' time was spent on non-investigatory matters - and most of their investigative work was done without ever leaving their office. The perception that most of officers outside IAD had of it was similar. IAD suffered a deserved reputation for attracting poor investigators, of focusing on petty misconduct rather than serious misconduct rather than serious corruption, and on conducting 'armchair investigations' - in the comfort of their offices rather than in the field.<sup>384</sup>

9.111 **England.** The English Police Complaints Board in a triennial report<sup>385</sup> commented on the unfortunately high incidence of investigating police officers who were too ready to accept the word of the alleged offending police officer against that of the complainant without proper consideration of the evidence. The English Home Office reported that in a significant number of the cases it scrutinised investigators had apparently whitewashed evidence for no apparent reason.<sup>386</sup>

9.112 The Maguire and Corbett survey suggested that the greatest degree of dissatisfaction was from those complainants who had actually had their complaints formally investigated and that the main reasons for this dissatisfaction were length of time taken to deal with the complaint, the absence of any apology, and the inadequacy of, or lack of explanation for, the decision made.<sup>387</sup> Satisfaction did not appear to be related to the outcome of the case.

9.113 **Canada.** The study of the Toronto complaints system suggests that police investigators are successful at getting complaints out of the process through a variety of tactics: discouraging complainants from going ahead with their complaints, discrediting witnesses, and encouraging and coercing withdrawals.<sup>388</sup>

## **The constant risk of significant corruption and misconduct**

9.114 The Commission considers that there is a constant risk of significant corruption or misconduct within law enforcement agencies including the AFP and the NCA. The Mollen Report commented on the universality of this risk in modern societies:

Any occupation comprising large numbers will have some corruption. More than any other profession, however, the police face seductive opportunities to turn corrupt. Today, many neighbourhoods of New York City are awash with drugs, money and guns, and our police are on the front lines. Potential for misuse of power and strong temptations challenge many of our police officers to abandon their oaths every day.

9.115 The Commission is not suggesting that Australia has the same magnitude of crime problems as New York but few would disagree that illegal drugs, money and guns constitute some of the most serious concerns in the Australian community. Just as for the New York police, Australia's law enforcement agencies are at the front line and a large number of their members face the same strong temptations on a regular basis. These temptations and opportunities are not a new phenomena and nor is there any reason to believe that they will disappear. In fact the evidence points to the constancy of the risk. These risks are magnified if defective or second rate complaints and anti-corruption systems are allowed to continue.

9.116 A large and ever increasing number of inquiries in Australia have examined or commented on the issue of police corruption. They include

- Beach (Victoria 1976)
- Lucas (Queensland 1977)
- Lusher (NSW 1981)

- Stewart (Commonwealth, NSW and Victoria 1986)
- Neesham (Victoria 1985)
- Fitzgerald (Queensland 1989)
- Lee (NSW 1990)
- Wood (NSW 1995).<sup>389</sup>

9.117 Henry has reviewed the tradition and evolution of police corruption. Police deviance has been so common that corruption has often been characterised as an abiding and endemic feature of police work. It is intrinsic to the nature of law enforcement in that police are given a special coercive force which is often exercised with considerable discretion and where internal or external oversight is necessarily limited.

9.118 There is a cycle of corruption, reform and public apathy which adequately describes the history of progress in many law enforcement agencies around the world. Henry argues that apathy has enormously deleterious effects upon corruption control efforts. The opportunities for corruption and misconduct are not static. The law enforcement environment changes as do law enforcement priorities and public opinion. A law enforcement agency that appears relatively 'clean' may not stay that way without continuing vigilance and effective pro-active responses. One of the greatest dangers is 'organisational inertia and a bureaucratic complacency born of excessive confidence in the effectiveness of existing systems'.<sup>390</sup> While environmental change may lead to the near extinction of a particular species of corruption, some forms will inevitably adapt to and flourish in the new environment.

9.119 Henry uses the example of New York to demonstrate how anti-corruption procedures that were initially successful can become unsuccessful and actually mask the onset of other serious malpractices. The reforms of the Knapp Commission in 1972 were extremely effective in reducing the traditional types of corruption such as graft from nightclub owners, gamblers and prostitutes. However, during the 1980's corruption took a new route to that of wide scale drug corruption. There was a proliferation of narcotics abuse in society and a rapid increase in narcotics related crime. Some New York police officers were not merely obtaining payments from drug dealers or robbing dealers and users, they were actively involved in the drug trade.

9.120 The NSW Police Service is an Australian example which bears out the resilience and adaptability of police corruption and serious misconduct.

## **NSW**

9.121 In the 1980's NSW Police Commissioner John Avery began a policy of major reform of the NSW Police Service. In the face of considerable opposition much of it generated by a hostile police culture Commissioner Avery succeeded in substantially implementing most of his reforms. He regionalised significant powers and broke down the many centralised specialist squads, particularly within the CBD, which were regarded as 'nests of corruption'. The core policing strategy was changed to community policing and the NSW Police Force became the NSW Police Service. The goal of reform in the NSW Police Service from 1984 to 1988 was stated as

To make the NSW Police Department the best in the world; to rid the organisation of the dark shadow of corruption; to encourage a high degree of professionalism; and to introduce community based policing as the principal operational strategy.<sup>391</sup>

Commissioner Avery was rightly praised as a police manager of great vision and commitment.

9.122 However, the reforms that were implemented did not rid the NSW police of corruption. Far from it, as the NSW Police Royal Commission that began in 1994 has only too painfully demonstrated. A series of commendable internally generated reforms and a management style at the top that was open and innovative did not remove the 'dark shadow'.

### ***The current level of misconduct and corruption within the AFP and the NCA***

9.123 The actual level of misconduct and corruption within the AFP and to a lesser extent within the NCA is the subject of some public debate and conjecture. In the Commission's view it will inevitably continue to be the subject of considerable conjecture while a body such as the NIIC is absent. The Commission accepts that there is no reliable evidence to suggest that currently corruption is systemic or endemic within the AFP or the NCA. In relation to the AFP, the Commonwealth Ombudsman has submitted that there is no evidence of the type of wide ranging problems that led to the establishment of the CJC in Queensland. The AFP has submitted that corruption within it is not systemic or widespread. It does concede that recent allegations of corruption are of concern. The NCA has advised that it considers that the opportunity for corruption or serious misconduct within its activities is 'limited'.

9.124 However, the Harrison inquiry is examining certain allegations of corruption in relation to the AFP.

9.125 One submission to the Commission suggested that misconduct and corruption within the AFP was common and that while the 'brotherhood' continued to exist misconduct would continue at unacceptable levels.<sup>392</sup>

9.126 ***Evidence from the NSW Royal Commission.*** The NSW Royal Commission has advised the Commission that 15 former or serving AFP officers have been adversely named in evidence before the Royal Commission.<sup>393</sup> One currently serving NCA officer has been the subject of adverse evidence. It must be stressed that the NSW Royal Commission is inquiring into corruption in the NSW Police Service. It has no responsibility to investigate corruption within the AFP or the NCA. The naming of those AFP officers and the NCA officer is a collateral result of its investigations into the NSW Police service and cannot therefore be used as a 'barometer' for estimating any corruption by the AFP or the NCA in the rest of Australia.

### **Special risks for the AFP and the NCA**

9.127 The AFP and the NCA are at the forefront of Australia's national law enforcement strategy against organised crime. Organised crime has been defined as a 'systematic and continuing conspiracy to commit serious offences'.<sup>394</sup> It may involve, for example, fraud, extortion, drug trafficking and money laundering. These are areas where there is significant potential for serious corruption and misconduct and where the consequences are serious.

9.128 The trade in illegal narcotics is arguably the biggest and most profitable enterprise in the world. The amounts of money involved are astronomical. A United Nations (UN) report stated that the identifiable costs of drug abuse in consumer countries seemed to range from 0.5 to 1.3% of gross domestic product, the largest part of which involves drug related crime and law enforcement costs.<sup>395</sup> The health costs of a drug addict appear to be some 80% higher than those of an average citizen in the same age group. There is also a nexus between drug abuse and Acquired Immunodeficiency Syndrome (AIDS). The UN reported that conservative estimates of the annual turnover of the global illicit drug industry from 400 billion to 500 billion US dollars. That would be equivalent to about one tenth of total international trade. It would nearly be double the turnover of global pharmaceutical companies. Langer pointed out in 1986 that

Maintaining the integrity of police and other criminal justice officials in the face of the financial inducements of the one hundred billion dollar drug traffic [as estimated in 1986] is the major challenge facing law enforcement agencies throughout the world.<sup>396</sup>

9.129 However, the impact on individuals and the community cannot be calculated simply in financial terms as enormous as they are. There are also devastating and tragic consequences for individuals, families and local communities. Social cohesion and integration are almost always compromised by the escalating drug problem.

9.130 The investigation of organised crime may involve the AFP and the NCA in dealing with a wide range of criminal activities. The AFP has had an increasing role in investigating white collar crime. It investigates major social security fraud and major fraud by personnel of Commonwealth agencies. As with drugs each of these costs the community dearly. At the moment there is no reliable estimate of the total cost of fraud on the Commonwealth. The Australian Federal Police Association (AFPA) estimated costs of public sector fraud at

around \$9 billion, including tax frauds estimated at \$3 billion, social welfare fraud at \$2 billion, customs duties evasion at \$2.5 billion, health/Medicare fraud at \$700 million and defence fraud at \$800 million.<sup>397</sup> Information from the respective government departments concluded that the total was actually less than \$2.3 billion.<sup>398</sup> The Australian Institute of Criminology (AIC) suggests that the difference between the two estimates may be largely due to different guesses at the extent of undiscovered crime. The AIC argues that the temptation for government departments would be to underestimate the extent of fraud in their area of interest in order to avoid unwelcome publicity and audit intervention. The AIC concluded that the range of estimates currently available from the AFPA and the departments should be seen as from optimistic to pessimistic.

9.131 CLEB has advised the Commission that it is gathering and analysing information provided to it with a view to making an accurate estimate of the cost of fraud against the Commonwealth.<sup>399</sup> CLEB is currently preparing a report to Government on progress in this task.

9.132 The AFP is also concerned with any international pedophile links with Australia and with threats of international or national terrorism. For example, the AFP investigated the Australian activities of the Japanese religious sect, Aum Shinrikkyo, alleged perpetrators of the Sarin gas attacks in Japan.<sup>400</sup> The AFP and the NCA may well have crucial roles to play in assessing and responding to terrorist risks at the Olympic Games in Sydney in 2000.

9.133 However, as the Commission has emphasised, law enforcement is not static. Problems and issues change. The AFP Commissioner has identified the following as growing areas of crime that are likely to confront society beyond the year 2000

- computer crime
- environmental crime
- intellectual property
- syndicated crime, whereby criminal organisations have international links and cut across most groups in society, be it political, business, entertainment, law enforcement or public service.

9.134 The AFP and the NCA clearly have very crucial roles to play in response to these classes of emerging crimes.

9.135 The risks that organised crime and these new crimes pose to the integrity of the AFP and NCA will only increase. It may only take one leaked piece of information, one telephone call or conversation, to compromise a large and complex law enforcement operation. According to the AFP Commissioner there has been a steady rise and infiltration into Australia of organised crime.<sup>401</sup> The Commissioner has commented that this has occurred with the support and involvement of dishonest and avaricious lawyers, bankers, accountants and politicians. Police investigations into organised crime will become increasingly difficult particularly as organised crime 'globalises'.

### ***The globalisation of crime***

9.136 Nearly all major crime issues impacting on Australia originate elsewhere, particularly in relation to drugs and fraud.<sup>402</sup>

Australia can no longer consider its crime problem to be largely domestic in nature and localised in its manifestation. No longer are we an isolated continent which enjoys natural protection; the pace of change has drawn us inextricably into the 'global village'.<sup>403</sup>

9.137 The AFP view is that organised crime has moved into new and lucrative crime endeavours. Many of these criminal networks operate under the guise of successful and legitimate businesses. There is a larger movement of people, cash and goods around the world. There have been significant changes in the nature and extent of global organised crime including the growth of international financial fraud, large scale organised drug trafficking and the emergence of new criminal groupings after the end of the Cold War. With

the breakdown of the former USSR there has been a significant increase in crime from Eastern Europe. International crime is becoming increasingly sophisticated and more difficult to combat as the following occurs

- the revolution in modern technology, particularly in communications and transport
- the development of global markets associated with deregulation of financial systems
- the progressive removal of border controls
- the emergence of new market economies.

9.138 There is increasing evidence that some criminal organisations, particularly those involved in drug trafficking, have reorganised their activities to resemble multi-national corporations. Strategic alliances have been established, profits shared and territory split as is demonstrated by the existence of arrangements between Colombian cartels, the Sicilian Mafia and the recently emerged but increasingly relevant Russian Mafia. Similarly, within South East Asia closer relationships now exist between Thai and Vietnamese drug traffickers and between the Japanese Baryokudan (or Yakuza) and Chinese Triads.<sup>404</sup>

9.139 The AFP argues that what is required is international and national collaboration between law enforcement agencies. For example, it is forging a strengthened alliance with the NCA and State and Territory police to detect and investigate major drug importations. While these alliances are no doubt necessary they bring their own risks to the integrity of the AFP and the NCA.

### ***Interaction with other agencies***

9.140 Increasingly law enforcement agencies are working closely with each other. The NCA's normal modus operandi is to work closely with other agencies. It also has seconded officers from a range of other federal State and Territory agencies including the AFP and State police services. The AFP has pointed to the growth and desirability of close working contact and joint operations. It is therefore becoming increasingly difficult to 'quarantine' a particular agency from the culture or activities of others. In some circumstances there are no doubt advantages in this co-operation in ensuring that proper procedures are maintained. However, in other cases this close interaction may lead to corruption or misconduct spreading across agencies. This apparently occurred with the Joint Drug Task Force when the AFP and the NSW Police Service worked together. What it may suggest that there is a concerted effort made to ensure the integrity of all agencies involved in any collaborative work.

## **Difficulties of detecting and dealing with misconduct and corruption**

9.141 There are other significant difficulties in achieving law enforcement accountability and integrity. These also relate to the nature of law enforcement. There are clear and constant difficulties in investigating law enforcement misconduct and corruption. The NSW Royal Commission into Police commented that corruption is 'insidiously difficult to detect and amounts to serious criminal conduct which requires the application of sophisticated and determined investigative techniques'.<sup>405</sup> The Royal Commission identified special difficulties in investigating police misconduct:

- police know the system and are likely to have early warning of any interest in their activities
- they are skilled in investigation techniques and counter surveillance
- they are likely to have corrupt associates willing to cover for them
- they are experienced in being interviewed, in being cross examined and in giving evidence
- their good credibility and character are readily assumed by jurors, courts and tribunals

- they can exert considerable personal influence over internal informants and internal investigators particularly if they hold senior rank.

# 10. Disciplinary systems for the AFP and NCA

## Introduction

10.1 Chapter 4 discussed the AFP complaints system and Chapter 5 dealt with a complaints system for the NCA. This chapter examines the current disciplinary processes of the AFP and the NCA and other options available to management to deal with poor or inadequate performance or misconduct. The Commission recommends a very different approach to the current AFP and NCA disciplinary processes. For the AFP this involves a change from the current quasi-criminal, para-military model to a new approach based on managerial responsibility and administrative review. For the NCA it would mean that it would have for the first time its own disciplinary code that would also be based upon managerial responsibility.

## Current AFP non-disciplinary responses to misconduct or poor performance

10.2 The AFP Commissioner has three major non-disciplinary options available to respond to employee unsuitability, poor or inadequate performance or misconduct:

- fixed term appointments
- performance appraisal
- the s 26E power to end appointments.

10.3 The failure to reappoint and the early ending of appointments can be relevant to cases where an AFP appointee is subject to complaints whether substantiated or unsubstantiated.

### *Fixed term appointments*

10.4 Since 1990 the AFP has had a legislative system of fixed term appointments of generally five years. The AFP can assess an employee's suitability as the date for consideration of re-appointment approaches. The AFP Regulations prescribes the minimum standards for appointment or re-appointment.<sup>406</sup> For re-appointment to occur the Commissioner must be positively satisfied that the person is suitable for re-appointment. The person must meet the requirements of competence and qualifications to hold a position including that the person is of 'good character and reputation' and meets other relevant criteria for suitability for the position. In its 1995-996 Annual Report the AFP advised that during the reporting period eight appointees were not reappointed after expiration of their fixed-term appointments although internal review of these decisions led to reappointment of four appointees. Six appointees were reappointed only for short terms.<sup>407</sup>

### *Performance appraisal*

10.5 The AFP also has a performance appraisal system for all staff. The Commission's consultations with AFP senior management indicated that the current performance appraisal system could be used more effectively to better provides a genuine and objective appraisal of performance. It was suggested that some supervisors have tended not to formally rate a person's performance as inadequate in a particular area when objectively that was the appropriate conclusion.

### *AFP's Employment Standards unit*

10.6 The AFP's latest Annual Report refers to the establishment within the AFP of a new unit called Employment Standards. It is intended to deal more effectively with those appointees who appear not to meet the AFP's professional standards whether this arises from poor performance or lack of integrity. It manages disciplinary processes, conducts employment suitability assessments in cases of likely non-reappointment and initiates action under s 26E.

### ***The DRP's views on fixed term appointments and performance appraisal***

10.7 The DRP concluded that fixed term appointments and performance appraisal are each valuable tools for AFP management. They can be used to ensure that only suitable persons are employed, that performance is effectively monitored and that appropriate management responses are made. They can provide effective incentives and disincentives to ensure high standards of performance and employee suitability. For example, re-appointments in cases where there are specific problems may be made for a lesser period, say two years, and subject to review and improvement in performance in the particular problem area.

### ***Sections 26E and 26F***

10.8 The Commissioner has the power under s 26E of the AFP Act to end an appointment before its due expiry. A person retired under s 26E may be entitled to the full superannuation benefits accrued. However, taking action under s 26E does not preclude the option of withholding superannuation in cases of corruption offences under the AFP Act. The AFP can also consider amendments to the relevant determination by the Commissioner on the AFP Adjustment Scheme Payment so that a person retired under s 26E for serious misconduct would not receive the compensation element for the period of his or her fixed term appointment not served. Currently where an appointee is retired under the provisions of s 26E on the basis of poor performance or employment suitability the decision is subject to full merits review under the unlawful termination provisions of the Industrial Relations Commission and Industrial Relations Court (IRC).

10.9 Section 26E has been used as an alternative to disciplinary proceedings. During the last financial year 11 appointees were retired early under the provisions of s 26E.<sup>408</sup> Some of the advantages of using s 26E when compared to the current disciplinary process are that it is quicker, more reliable and less expensive. The Commission's recommendations about the disciplinary processes in this chapter and chapters 11 and 12 are designed to improve the speed and effectiveness of that process and reduce its costs. However, the Commission considers that the AFP Commissioner should have a wide range of responses available to deal with poor or inadequate performance and misconduct. Management must decide the appropriate response to a particular case but any action taken must be according to the relevant provisions of the legislation and subject to any administrative review available.

### ***Amendments to s 26E***

10.10 The *Australian Federal Police Amendment Act 1996* (Cth) has amended s 26E and added s 26F to the AFP Act. The purpose of these amendments is to allow the Commissioner to respond quickly and effectively to corruption and serious misconduct cases. It enables the Commissioner to declare that a person is retired under s 26E because of serious misconduct that is having, or is likely to have, a damaging effect on the morale or self-respect of AFP personnel or the reputation of the AFP. The Commissioner must have reasonable grounds to make such a declaration. The declaration excludes such a person from the operation of the procedures for termination of employment provided by the *Industrial Relations Act 1988* (Cth).<sup>409</sup> Where a s 26F declaration is made the appointee may only seek judicial review of the decision under the ADJR Act.

10.11 The Commission supports the amendments to s 26E and the addition of s 26F so that the Commissioner can provide a quick response to corruption and other gross misconduct without having to wait for the outcome of disciplinary or criminal proceedings. The provision as amended is part of the 'necessary armour to combat corruption within the AFP'.<sup>410</sup>

### ***DRP's proposed amendment to s 26E***

10.12 The DRP proposed that further amendments to s 26E be made so that merits review for decisions under that provision would be provided by the AAT. Under the present provision the Industrial Relations Commission and the IRC provide merits review of all retirements under s 26E except for those involving serious misconduct under s 26F where there is no merits review available. The Commission considered that administrative review by the AAT would be more appropriate for s 26E. It made that proposal for the following reasons.

10.13 The Commission considered that administrative review by the AAT is the most appropriate mechanism for review of disciplinary decisions by the Commissioner. Decisions by the Commissioner under

s 26E are similar in process and result to the Commissioner's disciplinary decisions. They are both integral aspects of the AFP's managerial responsibilities. They both concern the Commissioner assessing facts and circumstances and considering an officer's suitability for employment.

10.14 The AFP is significantly different to many public sector organisations. It is constituted by a workforce which is engaged according to fixed term statutory appointments. In the case of the AFP, disciplinary breaches and a failure to perform satisfactorily should be regarded fundamentally as breaches of these terms of appointment. The industrial relations legal process with its emphasis on arbitration and decision-making across the broad spectrum of employees does not sit well with the specific fixed term appointments for AFP staff. The adoption of an industrial relations approach might tend to obscure the basic objectives of the disciplinary and managerial process and perhaps maintain a quasi-criminal approach with, for the serious cases, the application of something akin to the criminal standard of proof. The Commission was of the view that the attitude that disciplinary and employment suitability decisions are quasi-criminal is more likely to affect an industrial relations approach than the application of administrative review.

10.15 In the DRP the Commission expressed a concern about duplication of decision-making that might occur with the IRC having jurisdiction. Under its jurisdiction unlawful terminations are heard by judicial registrars. A party to the decision may ask the Industrial Relations Court to review the decision by the judicial registrar. The Commission was also concerned that an industrial relations process could increase delays and costs and expressed uncertainty about the stability of the IRC's caseload. The large number of unrepresented claimants and the IRC's preference for oral evidence might increase the duration of hearings.

### ***Submissions***

10.16 The AFP supported the introduction of a managerial model and the existence of full merits review to the AAT on s 26E decisions.<sup>411</sup> However, the AFP stated that there will be situations where a determination is made under s 26E based on a 'loss of confidence' in the appointee. In these situations which the AFP described as situations where the conduct, behaviour, reputation or character of an appointee is such that the Commissioner believes on reasonable grounds that he or she is no longer suitable for AFP service, the AFP was of the view that the option of reinstatement should not be available on review to the AAT. The AFP argued that in those cases the reinstatement of the person is likely to be harmful to the reputation, status and integrity of the AFP. The AFP drew a distinction between these situations of 'loss of confidence' and situations where a declaration is made under s 26F. It advised that there will be situations where the decision under s 26E is based on a 'loss of confidence' but the conduct will be insufficient to justify the making of a s 26F declaration.<sup>412</sup>

10.17 The Victoria Police supported the Commission's recommendation.<sup>413</sup> It stated that the proposal for the AAT rather than the IRC to review s 26E decisions was similar to the Victorian system where the decision to dismiss a member from the Force is administratively reviewed by an independent Police Review Commission (PRC) although the PRC can only recommend to the Commissioner that the decision to dismiss be accepted or varied. The Victoria Police expressed a concern with the terminology of s 26E suggesting that to declare a person 'retired' lends a veneer of dignity to what ought properly to be regarded as a disgraceful exit. They suggested that harsher terminology such as 'termination' or 'dismissal' would indicate that there was no dignity or respect in leaving the organization under these circumstances.<sup>414</sup>

10.18 A registrar of the IRC provided the Commission with updated figures in relation to review rates, length of hearings and the level of the IRC's workload.<sup>415</sup> In 1995-96 the review rate for determinations about unfair dismissals had fallen to 21% of orders. The submission stated that although the legislation provided for a hearing de novo, in practice, most parties consented to a judge conducting the review on the material that had been tendered in the lower court. Additionally a large number of review applications were settled or withdrawn prior to hearing so that only around 11% of orders made actually proceeded to a hearing before a judge. It also indicated that in 1995-96 the IRC experienced a stable caseload with cases being disposed of in a median time of 77 days from filing to finalisation. For matters proceeding to a hearing the median time was around 170 days. 83% of all cases were settled before a hearing. The submission also argued that the preference for oral evidence has not added to delays but reduced them, notwithstanding the large numbers of unrepresented litigants. Settlement rates were high and the duration of hearings was short. In 1995-96 40%

of claims were heard in half a day, 68% were heard in a day and 89% lasted up to two days. The IRC made no submission on the policy question of whether the IRC or the AAT should provide merits review.<sup>416</sup>

10.19 The AAT submission<sup>417</sup> also did not address the issue of whether there should be AAT or IRC review of s 26E decisions.

### ***Commission's view***

10.20 The Commission has noted the comments made by the Registrar of the IRC. The comments made in the DRP were based upon information provided in the IRC Annual Report of 1994-95 which contained the most up-to-date information available at the time of the DRP.

10.21 Notwithstanding the updated material provided by the IRC, the Commission still prefers that the AAT provide merits review of s 26E matters. The major reason for this preference is that it would achieve consistency in approach between s 26E matters and disciplinary decisions. It would mean that the one body could build up expertise and experience in dealing with AFP matters. It would also avoid duplication of infrastructure and administrative costs.

10.22 The AAT has submitted that it has experience in dealing with matters that concern employer/employee relationships. Therefore it would be well placed to review employment suitability decisions under s 26E.

10.23 The Commission has considered the AFP's proposal that reinstatement should not be available in relation to s 26E matters where the determination is based on a 'loss of confidence' in the appointee. The Commission agrees with the reasoning behind this proposal. The AFP Commissioner must have the final say about an officer's continuing employment in cases where the Commissioner no longer has sufficient confidence in the integrity or honesty of that officer. Law enforcement is a highly sensitive and demanding area that requires the highest level of integrity and trust from officers. As discussed in chapter 9 law enforcement officers exercise considerable powers and discretions in circumstances where it is difficult to maintain close and direct supervision of their use of those powers and discretions. There are also significant opportunities for misconduct and corruption. AFP personnel will often have access to highly confidential and vital information about citizens and law enforcement operations. AFP personnel must also be able to trust in the integrity of those officers with whom they work. That is an essential aspect of effective law enforcement.

10.24 The Commission also considers that these situations of 'loss of confidence' must be clearly identified in the legislation. Not every retirement under s 26E will fit into this category. Some officers may be retired under s 26E on the basis of poor work performance rather than on questions of lack of integrity. Therefore s 26E should be amended to identify those cases of 'loss of confidence'. The legislation should specify that it relates only to situations where it is the integrity, character or ethics of the appointee which is being questioned and not merely poor performance. In cases based upon loss of confidence the Commissioner should be required to consider whether any compensation should be paid for the early retirement. If the Commissioner determines that some compensation is appropriate then the Commissioner should determine the amount. These decisions by the Commissioner about whether to provide compensation and, if so, its amount should be reviewable on the merits by the AAT.

## **Recommendation 47 - Options for AFP management**

The AFP management should continue to have a wide range of options available to it to deal with inadequate or poor performance or misconduct. This should include fixed term appointments, an effective performance appraisal system and the capacity to retire a person as provided for under s 26E.

## **Recommendation 48**

Section 26E should be amended so that merits review for decisions under that section relating to failure to meet employment standards would be provided by the AAT.

Section 26E should also be amended to refer to decisions by the Commissioner to retire a person that is based on 'loss of confidence' by the Commissioner in an appointee. 'Loss of confidence' should be defined as situations where the Commissioner is of the view based on reasonable grounds that the ethics, character, integrity or honesty of the appointee is such that he or she is no longer suitable for service in the AFP. In situations where the s 26E decision is based on a judgement of 'loss of confidence' the AAT should be restricted to reviewing decisions by the AFP Commissioner as to whether any compensation should be provided and, if so, its amount. The AAT would not be able to order the reinstatement of the person the subject of a decision of loss of confidence.

There would be no merits review of decisions made under s 26F.

## **Application of these options to the NCA**

10.25 The DRP argued that fixed term appointments, a similar power to s 26E (expanded to include 'loss of confidence') and effective performance appraisal would be valuable options for the NCA. In particular, fixed term appointments are very important in the law enforcement area to ensure commitment to the objectives of the organization, to minimise bureaucratization, to reduce the opportunity for long term relationships that can foster corruption and to give management sufficient flexibility to allocate staff and resources to meet changing needs. The record of the AFP with fixed term appointments demonstrates its value for law enforcement agencies. The introduction of fixed term appointments would mean that the NCA would have an employment regime totally separate from the Australian Public Service.

10.26 The DRP proposed that consideration should be given to the NCA having its own employment regime including fixed term appointments, a power similar to s 26E and effective performance appraisal.

### ***Submissions and consultations***

10.27 The NCA in its submission pointed out that the recent review of the *Public Service Act 1922* (Cth) recommended that the notion of permanency should no longer be a feature of the Australian Public Service (APS).<sup>418</sup> The NCA also stated that a considerable proportion of NCA staff were already subject to fixed term appointments. It advised that it was currently reviewing the operation of its performance appraisal system for APS staff in co-operation with the Community and Public Sector Union. The revised procedures are to be introduced before 30 June 1997. Seconded police officers are subject to the appraisal systems of their parent forces.<sup>419</sup>

10.28 The NCA also asked whether the Commission had intended that any equivalent to s 26E of the AFP Act for the NCA would be subject to review by the AAT.

### ***Commission's view***

10.29 The Commission supports the position it took in the DRP. Those views are consistent with current trends. The NCA already has a significant number of staff on fixed term appointments and it is reviewing its performance appraisal system for APS staff. However, a major weakness with the current situation is that the

NCA does not have a formal performance appraisal system for seconded police officers. Under the Commission's suggestion there would be a performance appraisal system that included seconded police.

10.30 The Commission supports the introduction of these measures in relation to the NCA but recognises that their introduction would require considerable negotiation with relevant staff, unions and home police services that provide seconded officers. That is why the Commission is not recommending that these measures should be introduced forthwith. Further consideration should be given to these matters. If the NCA were to have an equivalent of s 26E then it should be subject to the same system of review as recommended by the Commission in relation to s 26E for the AFP.

#### **Recommendation 49 - Options for NCA management**

Consideration should be given to the NCA having its own employment regime including fixed term appointments, powers similar to s 26E (expanded to include 'loss of confidence') and s 26F and effective performance appraisal. Any equivalent to a s 26E provision should be subject to merits review by the AAT as recommended for s 26E itself (see rec 48).

### **The AFP disciplinary process**

10.31 The following section describes the AFP's current disciplinary process.

#### ***Decisions after investigation***

10.32 The AFP makes a decision about what action to take after considering investigation reports concerning complaints and allegations. If there is evidence to support a criminal action it is common practice to refer the matter to the Director of Public Prosecutions (DPP) or if the evidence supports a disciplinary charge to refer it to the Australian Government Solicitor (AGS) for a formal legal advising. There may be an exception where the potential criminal matter is bound up with disciplinary matters and it would be preferable for them to be heard as a package of disciplinary charges. This is a matter for consultation between the Ombudsman, AFP, DPP and AGS. The DPP prosecutes criminal charges and the AGS handles a disciplinary matter before the Disciplinary Tribunal. Where the DPP considers there is insufficient evidence for a criminal charge, then a disciplinary charge should be considered.<sup>420</sup> Action may also be taken as noted above by the AFP to terminate or not renew a member's fixed term appointment or to retire a person under s 26E.

#### ***Role of the Ombudsman after investigation***

10.33 The Ombudsman has certain powers to make recommendations and reports to the Commissioner after an investigation. These include recommendations that an appointee be charged with an offence or a breach of discipline or be cautioned or admonished.<sup>421</sup>

#### ***Role of the AFP***

10.34 Following an investigation by IID or the Ombudsman, the Commissioner may propose that the AFP member be charged, cautioned or admonished under the Complaints Act.<sup>422</sup> Where the Ombudsman disagrees with the Commissioner's proposed action, the Commissioner must refer the matter to the Attorney-General to determine what action is appropriate in the circumstances.<sup>423</sup>

#### ***Disciplinary offences***

10.35 The AFP disciplinary offences are provided for in the AFP (Discipline) Regulations. AFP appointees are guilty of a disciplinary offence if they contravene duties and responsibilities as provided for in the AFP (Discipline) Regulations. Specific offences are:

- failing to behave with courtesy to the public and failure to comply with the law and relevant General Orders and Instructions
- disobeying or failing to carry out orders

- making deliberately false entries or statements
- failing to report loss or damage to property or to account for property
- unauthorized use of firearms
- drinking or taking drugs while performing duties
- intentionally prejudicing police services by failing to give prompt attention to one's duties or being absent from duty without authority
- improperly disclosing information about complaints or allegations
- unauthorised communication of information including computer programs or information stored in computer programs
- seeking influence to obtain a benefit
- soliciting or accepting gifts or gratuities
- performing work outside the AFP
- failing to give notice of bankruptcy.

10.36 Many of the charges that are proceeded with are of a general nature, alleging improper conduct. There are the following general disciplinary offences

- being guilty of disgraceful or improper conduct, either in an official capacity or otherwise
- acting in a disorderly manner or in a manner unbecoming an AFP appointee
- acting in a manner prejudicial to the good order and discipline of the AFP
- acting in a manner that brings, or is likely to bring, discredit to the reputation of the AFP
- being charged with a criminal offence and the court is satisfied that the charge is proved.

10.37 AFP appointees who aid or abet the commission of any disciplinary offence are also deemed guilty of that offence.

### ***The role of the Federal Police Disciplinary Tribunal***

10.38 The Tribunal was established under the *Complaints (Australian Federal Police) Act 1981* on 1 May 1982. It consists of a President and a number of deputy presidents and other members as appointed by the Governor-General. The Presidents and Deputy Presidents must be holders of a judicial office while other members must either be magistrates or legal practitioners of at least five years standing. The positions may be part-time.<sup>424</sup> The Disciplinary Tribunal when sitting is constituted by one member.

10.39 The Tribunal's role is to determine promptly and effectively proceedings instituted in respect of breaches of discipline by members of the AFP and appeals arising out of findings made or penalties imposed by the Commissioner of Police.

10.40 The Tribunal may also enquire into a matter relating to the AFP that is referred to it by the Attorney-General. In these circumstances, the Tribunal may be assisted by counsel, a member of IID or the AFP. The Tribunal then reports to the Attorney-General on its findings. This broad power of review could be very useful in reviewing controversial aspects of the AFP's operations or matters that raise significant public interest. However, the Commission understands that no such reference has ever been made.

10.41 The Tribunal may determine its own procedure subject to the Act and Regulations.<sup>425</sup> The Tribunal is to conduct its proceedings with as little formality and technicality as a proper consideration of the matter permits.

## **Comments on the current AFP disciplinary process**

### *Some criticisms made of the FPDT's decision-making processes*

10.42 The DRP reported specific criticisms that suggested that the Tribunal's decision making process results in some inappropriate findings and lenient penalties. According to the AFP and the Ombudsman the process is too formal, legalistic and too slow.<sup>426</sup> The AFP submitted that the average period from notice to the Tribunal to a hearing by the Tribunal has been six months.<sup>427</sup> According to the AFP the Tribunal has taken a quasi-criminal approach, in that its procedures and formality approach those of a criminal trial.

### *Perception of leniency of courts and tribunals*

10.43 The Commission's consultations and submissions indicated that the perception of lenient treatment of officers who are guilty of significant misconduct is widespread under the current AFP disciplinary process. The most obvious and serious examples are where officers are dismissed from the agency for significant misconduct such as serious assault but are then re-instated by the appeals mechanism. This perception is not unique to the AFP. Other Australian police services are concerned with the same issue.

10.44 Members of the Victorian IID advised the Commission that in their opinion the Victorian Commissioner of Police had often taken a more serious attitude to police malpractice than the courts. Often the Commissioner imposed heavier penalties. The now defunct Victorian Police Discipline Board had also not provided effective or appropriate sanctions. Those Victorian police consulted believed that matters were not found proven even in cases where there appeared to be convincing evidence. Lenient penalties sent the wrong message to complainants and to other police officers.<sup>428</sup>

10.45 Similar comments about the record of courts and tribunals were made by senior police from the Tasmanian police service. Under the Tasmanian police disciplinary system the subject officer can elect to appeal to a Magistrate from a finding by the Commissioner and from the Magistrates Court to the Supreme Court. According to the police consulted there is a real problem in upholding the Commissioners' disciplinary decisions because police officers are skilled in giving evidence and appearing in court.<sup>429</sup>

10.46 Senior officers of the South Australian Police consulted by the Commission suggested that the South Australian police were attempting to move away from an adversarial model to one that gave greater emphasis to rehabilitation and improvement.<sup>430</sup> A managerial approach could deal with disciplinary and performance issues more quickly and effectively than the current approaches. A number of senior AFP police in South Australia told the Commission that the current tribunal process was far too adversarial and minor matters could be the subject of protracted litigation.<sup>431</sup>

10.47 The lenient treatment or the perception of lenient treatment of an officer who is guilty of significant misconduct may lead to a demoralising cynicism and a loss of faith within an organization. Good, professional officers concerned with the health and standing of their agency may become frustrated and apathetic about improving police culture. Officers who are seen to be 'let off the hook' may become a liability within the agency and there is often an understandable reluctance to trust them in the performance of ordinary law enforcement tasks or for them to have access to any confidential information. Individual complainants and members of the general public who become aware of lenient penalties may also become sceptical about the commitment of the police to maintain appropriate standards of conduct.

### *Responses by the President of the FPDT and by a former member*

10.48 The DRP also reported the response of Justice Foster, President of the FPDT and a consultant to this inquiry, to these criticisms. His Honour advised that since the 'inappropriate' criminal standard of proof was removed in 1993 different results are observable by the Tribunal. According to his Honour, while the

criminal standard in the past may have led to decisions that were regarded as 'lenient', when assessed by the ordinary civil standard of proof, the situation is now different.

10.49 Justice Foster advised the Commission that the Complaints Act 'envisages' that hearings should at least approximate to curial hearings in the ordinary sense. Matters before the Tribunal are hotly contested and it has necessarily adopted procedures that are appropriate to essentially adversarial litigation. In response to the suggestion that the Tribunal has been too 'legalistic' Justice Foster advised that the Tribunal's proceedings have the formality necessary to attach public credibility to the proceedings, such as is accorded to a hearing of a charge before a Magistrate. He also rejected criticisms of delay. He advised that once the Tribunal is notified that the parties are ready to proceed the Tribunal is able to arrange suitable hearing dates at the first reasonable time. The Tribunal has never received any complaints of delay in the conduct of its proceedings. It has succeeded in assigning early hearing dates, notwithstanding an 18 month delay in filling a vacancy after the retirement of a member.

10.50 Justice Foster also emphasised the following matters. The Tribunal is independent. It is not part of the internal investigation machinery of the AFP. It does not exist to enforce any particular disciplinary policy. It has no inquisitorial role. It has no conciliatory role. Its only role is to adjudicate upon the charges brought before it, ie to hear and determine them on the evidence placed before it, giving a reasoned decision in accordance with law. Its hearings are conducted in public (except where considerations of security demand otherwise). Its determinations, both on the question of guilt and appropriate penalty, depend upon evidence placed before it. It is, of course, necessary that such evidence be tested by cross-examination. Common justice requires that it only hear evidence in the presence of both parties. If the Commissioner is of the opinion that the re-instatement of a dismissed officer produces problems in relation to employability and general morale, then the Tribunal needs to hear evidence of these matters in the presence of the officer charged. Evidence of good character and conduct is frequently given on behalf of officers charged with disciplinary offences, frequently from responsible senior officers. In accordance with accepted legal principle, such evidence is received and considered both in relation to guilt and penalty. If no countervailing evidence is given, the Tribunal may well give a decision perceived by some to be 'lenient'.

10.51 Mr John Dainer, a Special Magistrate for the ACT and a former member of the FPDT, also responded to the criticisms of the FPDT expressed in the DRP.<sup>432</sup> He stated that the Commission had offered no evidence to support the contentions made by the AFP and the Ombudsman that the FPDT's procedures are inflexible and formal. He also took issue with the criticisms regarding delay and leniency in sentencing. He pointed out that only Presidential members have sentencing powers and that a non-Presidential members role is only to adjudicate on the question of whether a charge has been made out to the required proof and that if so satisfied the matter is remitted to the Commissioner for imposition of a penalty.

### ***Commission's views***

10.52 The DRP did not express a formal view on whether the criticisms of the FPDT made by the AFP and the Ombudsman could be substantiated. It noted the lack of confidence expressed by the two agencies and suggested that it provided additional support for the need for a significant change in approach that in the Commission's view was supported by other fundamental policy considerations that are discussed immediately below.

## **A new approach: managerial responsibility and administrative review**

10.53 The DRP expressed the view that the current philosophy underpinning the disciplinary process is inappropriate and outdated for law enforcement agencies such as the NCA and the AFP. Complaints and resulting disciplinary proceedings have been dealt with by the application of a largely inflexible, formal process that tends to be adversarial in character. While modern police management has changed substantially the disciplinary process has not kept pace.

10.54 Historically the police have tended to regard themselves as a para-military force with an emphasis on hierarchy and the imposition of discipline through formal channels such as laying disciplinary charges for infractions, whether minor or serious. To a large extent this approach removes responsibility for discipline from line managers of the AFP.<sup>433</sup> Its main defect is that it does not focus on the fundamental issue which is

that of employment suitability. Disciplinary proceedings are not criminal matters and do not require the criminal process and trial.<sup>434</sup> The Federal Court has stated that

[t]he object of disciplinary proceedings under the Discipline Regulations is to protect the public, to maintain proper standards of conduct by members of the Australian Federal Police and to protect the reputation of that body. The object of disciplinary proceedings is not to punish.<sup>435</sup>

10.55 The current inflexible disciplinary process encourages some supervisors to use it in cases where other management responses would be more appropriate and useful. This is especially so for minor infractions of rules and procedures where there is no suggestion of wilful misconduct and no serious consequences flow from the breach.

### ***DRP proposal for increased managerial responsibility***

10.56 The DRP proposed that the current AFP disciplinary system be replaced with a managerial decision-making model taking the following format.

10.57 After a matter has been appropriately investigated the AFP Commissioner would be required to consider any relevant information about the officer's conduct which in most cases would include the investigator's report containing responses from the officer and a transcript of interview with the investigator. If the Commissioner or delegate is satisfied that an allegation of misconduct has been substantiated the Commissioner or delegate may commence misconduct proceedings against the appointee.

10.58 The action for misconduct must be in writing, contain particulars of the alleged misconduct and contain the Commissioner's proposed course of action in response to the misconduct. The action for misconduct must also advise the officer that she or he may respond in writing to the misconduct action and the Commissioner's proposed course of action. The legislation should specify the date by which the appointee must respond. Twenty eight days might be an appropriate period. The Commissioner or delegate must consider any response by the appointee in making a decision about the appropriate outcome. This final decision by the Commissioner would be reviewable by the AAT. The whole misconduct process would be open to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) on the basis of an error of law.

10.59 This process would be similar to the Victorian position where senior commissioned officers are appointed to inquire into disciplinary charges in a non-adversarial, administratively based process where they are required to apply the principles of natural justice. The structure of the Victorian proceedings is as follows.

- Where the Chief Commissioner reasonably believes that a member may have committed a breach of discipline he or she may begin a preliminary investigation.<sup>436</sup>
- If after the preliminary investigation the Chief Commissioner or an authorised officer reasonably believes there has been a breach of discipline the member may be charged with a breach, provided the member has been given an opportunity to provide a written explanation of the matter.<sup>437</sup> The form and details to be provided by the charge are prescribed in the legislation.<sup>438</sup>
- The Chief Commissioner or an authorised officer must inquire into the charge<sup>439</sup> and must make a determination.<sup>440</sup> The exact procedure to be adopted for a particular inquiry is at the discretion of the person conducting it but it is to be conducted with as little formality and technicality as possible. Those conducting the inquiries are not bound by the rules of evidence but they are bound by the rules of natural justice. The member charged with a breach of discipline may be represented by anyone apart from a person admitted to practice as a barrister or solicitor. The standard of proof required is that of reasonable satisfaction in accordance with the principles established in *Briginshaw v Briginshaw*.<sup>441</sup>
- Disciplinary decisions made under this process are reviewable by the independent Police Review Commission which is limited to making recommendations that the decision be accepted or varied.<sup>442</sup> It cannot impose or substitute its own decision.

### *Administrative review*

10.60 The DRP argued that administrative review is clearly the most appropriate decision-making process when the fundamental objectives and circumstances of the disciplinary process for law enforcement agencies are considered. The key objectives are employee suitability and the achievement of appropriate standards of conduct. The law enforcement agency must have primary responsibility for the imposition of a penalty. This principle is generally agreed upon. However, there must be external review of this internal decision-making process to ensure effective accountability and transparency and to protect the rights of officers to natural justice and a fair hearing. Administrative review meets each of these requirements.

10.61 Law enforcement is one of the most crucial areas of the interface of the citizen and the State. The actions of the police have great potential to affect the rights and liberties of citizens.<sup>443</sup> Moreover, it is the police and law enforcement agencies generally who have the ability to use force in certain circumstances to carry out their duties. They are almost unique in this regard. Law enforcement officers may also have greater potential for significant corruption and other forms of misconduct than most other members of groups in the community. The nature of their work and the people they deal with, for example, criminal suspects who may have access to large amounts of money or drugs, increases the risk of significant corruption and often in circumstances where it is difficult to detect and where police cultures have tended to condone or at least failed to bring to notice misconduct.

10.62 The NSW Royal Commission into Police's Interim Report identified special difficulties in investigating police misconduct:

- police know the system and are likely to have early warning of any interest in their activities
- they are skilled in investigation techniques and counter surveillance
- they are likely to have corrupt associates willing to cover for them
- they are experienced in being interviewed, in being cross examined and in giving evidence
- their good credibility and character are readily assumed by jurors, courts and tribunals
- they can exert considerable personal influence over internal informants and internal investigators particularly if they hold senior rank.

10.63 In summary, law enforcement officers are in a special position of trust and responsibility with the community because of their capacity to use force, the wide scope for the exercise of individual discretion from officers even low in rank, the significant potential for misconduct or corruption and the difficulties in proving misconduct. They are in this special position of trust when compared to the vast majority of other occupations within the community. There is a vital public interest in ensuring that only people of high repute and performance remain in law enforcement agencies. In all these circumstances it is imperative that the basic objectives of the disciplinary process are effectively met. Administrative review offers the greatest opportunity for that to occur.

### *What is administrative review on the merits?*

10.64 The Administrative Review Council (ARC) has stated that

Merits review is the process whereby an administrative decision is reviewed on the merits: that is, the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision affirming, varying or setting aside the original decision is made.<sup>444</sup>

10.65 Merits review can take place either internally within the organization that made the original decision or externally. The objective of a merits review system is to ensure that an agency's administrative decisions are correct and preferable.<sup>445</sup> The ARC has also indicated that other objectives of the merits review process are:

- to improve the quality and consistency of agency decision making by ensuring that review decisions are reflected by agencies in other similar decisions and in the development of agency policy and legislation
- ensuring merits review is accessible (cheap, informal and flexible) and responsive to the needs of applicants for review
- enhancing the openness and accountability of the agency.<sup>446</sup>

### ***Who should provide administrative review?***

10.66 The DRP proposed that the AAT should provide administrative review. The AAT is the principal federal agency for the provision of administrative review on the merits. It is an independent body which reviews on the merits a wide range of administrative decisions made by Commonwealth departments, Ministers and other tribunals. It can only review decisions where it is given specific power to do so under the relevant legislation. It currently reviews decisions relating to, for example, taxation, social security, veterans affairs, civil aviation, customs and freedom of information (FOI).

10.67 It already has jurisdiction in reviewing matters that involve similar considerations as would arise under the AFP disciplinary process. Much of the AAT's work concerns review of the giving, suspension or revocation of licences or authorizations to carry out activities in the commercial area and in community activities. For example, the AAT has review of the grant of export licences and civil aviation licences. In other words the AAT frequently reviews decisions relating to the fitness of individuals and organisations to carry out complex or significant tasks that involve broad community interests. These matters can involve safety and revenue issues and the right of the community to have access to information about public sector activity. The AAT also has some current jurisdiction concerning criminal or disciplinary matters. This includes hearing appeals under the *Migration Act 1958* (Cth) relating to deportations on the basis of criminal record and the review of decisions involving the Health Insurance Commission.<sup>447</sup>

### ***Responses to DRP 2***

10.68 Some submissions considered that the AAT structure may not be appropriate for the review of disciplinary decisions particularly where the outcome could be loss of employment by a police officer.<sup>448</sup> It was argued that in those cases police officers were entitled to a substantial level of procedural protection. The Queensland Law Society, for example, suggested that disciplinary offences for police should be heard within a separate division of the Federal Court where the person presiding was a Federal Court judge.<sup>449</sup>

10.69 The Administrative Review Council, although supporting administrative review, did not consider the AAT as a suitable alternative for the following reasons:

- reviewing decisions according to the principles of administrative law does not always result in informality of the review process
- disciplinary matters are always likely to be vigorously defended and the need to ensure procedural fairness in these types of situations will in most cases mean the body hearing the matter adopts a relatively formal procedure
- matters dealt with under the AFP discipline regulations could be seen as employment related and government policy to date had been that the AAT not have a role in reviewing such matters.<sup>450</sup>

10.70 Justice Foster<sup>451</sup> and Mr John Dainer<sup>452</sup> did not support the AAT having jurisdiction. Justice Foster argued that the volume of cases would not be sufficient to justify a specialist division of the AAT being formed. Accordingly these cases would be placed in the general list of the AAT and dealt with in turn. This process was likely to result in delays in hearing the cases that were greater than any delay under the current system. Justice Foster also argued that abolishing the FPDT would be a waste of the talent and experience of the members of the Tribunal in dealing with matters of police discipline. In his view experience in evaluating the testimony of police witnesses is invaluable for the discharge of these functions. Mr Dainer, said in

relation to the argument that the AAT possessed flexible procedures such as a discretion to admit evidence, to take an inquisitorial position in investigating matters, to mediate and conciliate matters pre-trial, to employ alternative dispute resolution and to control pre-trial preparation of cases, that the FPDT possessed all those powers apart from those of mediation, conciliation and ADR which were unlikely to be relevant in these types of cases in any case. Both Justice Foster and Mr Dainer indicated that they saw little difference in the formality of proceedings before the AAT and the FPDT. They took a similar view to the ARC in relation to the vigorousness with which disciplinary matters would be litigated and the impact this was likely to have on the level of formality.

10.71 After further consultations with the Commission Justice Foster indicated that he had a much clearer idea of why it was considered necessary for the AFP to take responsibility for the primary decision making in disciplinary matters and could appreciate the benefits of the managerial model. He suggested that if administrative review was preferable then the FPDT could provide a form of administrative review of the Commissioner's original decision and that this would have advantages over giving the AAT jurisdiction.

10.72 Justice Foster stated that the amount of work would be unlikely to warrant a specialist division of the AAT being set up and that accordingly the cases would be required to go into the normal list of the AAT. He believed that the delay in these lists would be in excess of any delay in obtaining a hearing before the FPDT. He also stated that merits review of a decision by the Commissioner or his delegate as to liability and penalty would be unlikely to be limited to reviewing the written material the Commissioner or his delegate had before him or her. Rather it was likely that the AAT would wish to see and hear witnesses in what would be a hotly contested case.

10.73 Justice Foster argued that flexible procedures were much easier to put in place when a primary decision was being reviewed rather than being made by the relevant tribunal and suggested that the present tribunal might be able to fulfil this function by utilising more flexible procedures. He expressed a concern that transferring the functions of the FPDT to the AAT would result in a waste of talent and experience that was not in the interests of the public or the AFP.

#### ***Submissions and consultations in support of the AAT having jurisdiction***

10.74 The AFP supported review of misconduct decisions by the AAT. During the Commission's consultations a number of senior officers also supported administrative review of disciplinary decisions.<sup>453</sup> The Victoria Police argued that administrative review was the most suitable process but that the outcome of that review should be restricted to a recommendation to the AFP Commissioner rather than a direction.<sup>454</sup>

10.75 The Attorney-General's Department stated that it saw considerable merit in the proposal to move away from the quasi-criminal paramilitary model to an approach based on managerial responsibility and administrative review.<sup>455</sup> The AAT was an appropriate body although giving the AAT this jurisdiction would require significant amendments to the AAT Act and might also require the AAT to adopt changed procedures because of the special needs of this jurisdiction. The Department indicated that it saw real benefits in the AAT's effective case management system which ensured fewer delays and less likelihood of either party being ambushed at hearings. It indicated that consideration needed to be given to the constitution of the AAT for review of AFP and NCA misconduct decisions. It suggested that for serious cases such as dismissal the review should be conducted by three members.<sup>456</sup>

10.76 The South Australian Police Complaints Authority told the Commission that there was a need for administrative review as there was a need to move towards a more managerial model for police discipline because there were extensive problems with the quasi-criminal format.<sup>457</sup>

#### ***AAT's submission***

10.77 The AAT found the arguments put forward by the Commission for administrative review convincing.<sup>458</sup> It said that disciplinary decisions were fundamentally civil in nature with an onus of proof that was less than beyond reasonable doubt. Although acknowledging that matters which involved outcomes which might seriously affect an individual's livelihood employment or reputation were often vigorously disputed it stated that the substance and procedure of administrative law had provided effective review of

such matters. The AAT stated that, although the appointment of new members might be required, the Tribunal currently has a number of members with experience and knowledge in relevant areas.

10.78 Moreover the AAT currently reviews decisions which relate to employer-employee relationships and with cases that involve consideration of disciplinary action. Additionally the Tribunal has in place practices and procedures which are sufficiently flexible and could accommodate the new jurisdiction.<sup>459</sup>

### ***Commission's view***

10.79 The Commission believes that many of the objections to the proposal for administrative review fail to acknowledge the major objective of disciplinary systems as stated in *Harcastle v Commissioner of Police*<sup>460</sup> as being the protection of the public and the maintenance of proper standards of conduct by members of the AFP. The process is not criminal and it is not intended to punish individuals. Within the proposed structure officers will still be assured procedural fairness but within a system that aims at ensuring the correct and preferable decision in an informal, affordable and timely fashion.

10.80 The Commission notes the recent report of the Administrative Review Council (ARC) *Better Decisions: review of Commonwealth Merits Review Tribunals*.<sup>461</sup> In that report the ARC recommended that the existing specialist review tribunals and the AAT should be merged in a single tribunal to be known as the Administrative Review Tribunal (ART). The ART would have various divisions and there would be a further level of review by a Review Panel (although this would be only with the approval of the ART President). The suggested divisions were:

- Welfare Rights Division
- Veteran's Payments Division
- Migration Division
- Commercial and Major Taxation Division
- Small Taxation Claims Division
- Security Division and
- General Division.

10.81 The ARC proposed a number of principles that should determine the location of any new review jurisdictions:

- there should be a preference for any new review jurisdiction to be accommodated within the existing review framework so as to avoid the unnecessary proliferation of tribunals
- high volume jurisdictions should be contained within a specialist division of the ART
- certain types of decisions requiring particular expertise were unlikely to justify the establishment of a new tribunal on the basis that the ART would have a broad base of members who should cover all necessary areas of expertise.

10.82 The Commission supports the proposals of the ARC and would favour the administrative review of AFP and NCA misconduct decisions being dealt with under this new structure. Although the review applications are likely to be small in number, they are likely to require a considerable amount of specialist experience in relation to law enforcement. The Commission would favour these decisions being located within the Securities Division of the proposed ART. The Commission recognises, however, that the Government has yet to respond to the ARC's report.

10.83 For the purposes of this report the location of the review process must be dealt with in the existing system. The Commission reaffirms its support the proposal put forward in the DRP that the matters should be dealt with by the AAT. The Commission gave serious consideration to the option of having a reshaped FPDT providing administrative review of AFP and NCA disciplinary decisions but finally determined that the AAT was better placed to provide that form of review. The Commission acknowledges the expertise and experience of the current and past members of the FPDT. However, on balance, the Commission considers that the AAT's submission that it was an appropriate forum for the jurisdiction is persuasive. The Commission's preference for the AAT having the jurisdiction is also consistent with the recommendations of the ARC's report *Better Decisions: review of Commonwealth Merits Review Tribunals*.<sup>462</sup> The Commission envisages that administrative review of AFP disciplinary decisions would be located within the Security Appeals Division of the AAT.<sup>463</sup>

### **Recommendation 50 - Merits review by AAT**

The AAT should provide review on the merits of misconduct decisions by the AFP.

## **The lack of a formal NCA disciplinary process**

10.84 The NCA does not have its own formal disciplinary code. Staff who are employed under the *Public Service Act 1922* (Cth) are subject to Australian Public Service disciplinary proceedings and rights of review. The majority of NCA staff are employed under the *Public Service Act 1922* (Cth). They exercise their rights by lodging an application for review with the Merit Protection Review Agency. However, no other categories of staff of the NCA come within the Public Service Act disciplinary code and review process. The current options for disciplining other NCA staff members are essentially informal. Thus, for example, the major sanction open to the Chairperson in relation to seconded officers is to terminate the secondment and return the officer to the home agency. There is no particular sanction available in respect of consultants except for terminating their contracts.

### ***DRP proposal***

10.85 The DRP considered that it was fundamental to the effective management of the NCA that it should have a formal misconduct code that applies to staff members in their work for the NCA. The NCA should have its own code of misconduct with procedures for making findings as to liability and determining penalties.

10.86 Where an NCA staff member is a State or Territory seconded officer or a member of a joint task then agreements could be entered into with the relevant home agency for the NCA to determine appropriate disciplinary action where the Chairperson is satisfied that a breach has occurred. The NCA would report the result of the action to the home agency and that result would be part of the officer's continuous service record. The home agency could decide that further action was necessary as a consequence of the NCA's determination but would have to take into account any penalty already imposed by the NCA. These suggestions might require some amendment to home agency legislation about discipline.

### ***NCA's response***

10.87 The NCA stated that introduction of a misconduct code would require extensive consultation.<sup>464</sup> In the case of NCA members (that is the Chairperson and members) a misconduct code would be inconsistent with their statutory appointments and with the means provided under the NCA Act for review of a member's decision. The NCA stated that although there was no objection to the Chairperson and members being subject to a misconduct code, the system should be consistent with obligations imposed on all holders of Commonwealth statutory offices.

10.88 The NCA also submitted that to apply a misconduct code to NCA public service staff would place these staff in a position far different from that of any other public service employee. Would only the NCA code apply or would the APS staff be subject to both the NCA code and the general APS code? The NCA also argued that the application of the code to members of task forces who were not seconded to the NCA would be unrealistic as the NCA has no day to day supervision or control over such officers. Further, any

attempt to impose a code on members of task forces who were not seconded to the NCA might threaten national co-operation between law enforcement agencies as it presently exists. Finally, there was likely to be a number of situations where the officer had returned to their parent organization by the time the complaint was made and that in such cases any disciplinary action would be likely to be taken by the home agency.<sup>465</sup>

### ***Other submissions and consultations***

10.89 The Queensland Police Service (QPS) held the view that matters relating to the administration of discipline amongst members of the QPS including those on secondment to the NCA should remain the responsibility of the QPS and that all reports or recommendations made against seconded members should be referred back to the home State for action.<sup>466</sup> The Queensland Police Union of Employees also believed the system that presently operated with seconded Queensland police officers was appropriate.<sup>467</sup>

10.90 The South Australian Police acknowledged the need for the NCA to have its own misconduct code and disciplinary procedures but stated that such a system would have an impact upon the formal and working relationship between the NCA and the SA police and also on the SA management based disciplinary model.<sup>468</sup> It suggested that detailed discussions would be required between all parties to develop this model. The Victoria Police in their submission took a similar view supporting the establishment of an NCA misconduct code and its application to seconded personnel in principle but acknowledging that this was contrary to the existing memoranda of understanding and would need thorough examination in the light of legislative requirements in each jurisdiction.<sup>469</sup>

10.91 During its consultations the Commission was advised by a staff member of the NCA that a discipline code was necessary in order to ensure that there was uniformity of approach in the conduct of seconded officers.<sup>470</sup>

### ***Commission's view***

10.92 The Commission believes that a code of conduct is an essential part of the accountability regime of the NCA. The introduction of a discipline code for the NCA will require extensive consultation between the NCA, the AFP and State police forces. The Commission would answer the questions and concerns put forward by the NCA in its submission by saying that there would only be a single code covering all staff and secondees of the NCA. Former APS staff therefore would cease to be covered by the APS code and would be covered solely by the NCA code. As for taskforce members they would only be covered by the NCA misconduct code in so far as their actions related to NCA work. Where their actions were not related to NCA work they would not be subject to the NCA code.

### **Recommendation 51 - NCA misconduct code**

The NCA should have its own misconduct code that applies to all NCA members and staff. The preferable method for achieving this is for the NCA to enter into agreements with the relevant home agencies of seconded officers or joint task force members to enable those officers to be subject to the misconduct system of the NCA in relation to their actions or purported actions under the NCA Act or the exercise of their powers and functions under the NCA Act.

### **Administrative review by the AAT of NCA decisions**

10.93 The DRP proposed that any disciplinary decisions made by the NCA should be subject to administrative review by the AAT in similar fashion to the AFP process on the basis that both the AFP and the NCA are federal law enforcement bodies with similar agendas and objectives.

### ***Submissions***

10.94 The NCA presumed that disciplinary action would follow where the Chairperson was satisfied that a breach has occurred based on a finding of fact and recommendation by the NIIC.<sup>471</sup> The NCA asked whether the proposed administrative review of the Chairpersons's decision should instead be of the NIIC investigation and report.

10.95 The Victorian Police suggested that the power of the review body should be limited to making a recommendation to the Chairperson.<sup>472</sup> The AAT supported the proposal as did the Attorney General's Department although the Department acknowledged that similar issues as were raised by the review of AFP decisions were raised by the review of NCA decision.<sup>473</sup>

***Commission's view***

10.96 It is the decision of the NCA Chairperson to impose a sanction that would be reviewed by the AAT. Although this may involve reviewing the evidence put before the Chairperson it would not be a review of a NIIC report or investigation.

**Recommendation 52 - AAT review of NCA misconduct decisions**

The AAT should provide merits review of NCA misconduct decisions.

# 11. Consequences of administrative review by the AAT

## Introduction

11.1 Chapter 10 dealt with the disciplinary processes of the AFP and the NCA. It recommended a system of managerial decision-making subject to administrative review. It also recommended that the most appropriate body to provide that review was the AAT. This chapter deals with a number of substantive and procedural consequences that follow from having the AAT review these decisions. It also recommends a number of further reforms to disciplinary proceedings.

## The standard of proof

11.2 The current standard of proof for AFP disciplinary proceedings is the balance of probabilities.<sup>474</sup> The Federal Police Disciplinary Tribunal adopts the approach in *Briginshaw v Briginshaw*<sup>475</sup> of proof upon reasonable satisfaction. In that case Dixon J said

reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the answer has been proved to the reasonable satisfaction of the Tribunal.<sup>476</sup>

### *DRP's proposal*

11.3 The DRP proposed that where AFP and NCA matters were being reviewed by the AAT, the standard of proof should be the usual standard applied by the AAT. This is reasonable satisfaction on the balance of probabilities.<sup>477</sup>

### *Submissions*

11.4 A number of submissions agreed that the standard of proof should remain on the balance of probabilities.<sup>478</sup> This standard was thought to be consistent with disciplinary proceedings in other professions and a reasonable approach which avoids an appearance of unfairness to appointees charged with more serious disciplinary offences.

11.5 On the other hand the Police Association of South Australia<sup>479</sup> and the Law Society of Western Australia<sup>480</sup> took the view that the standard should be beyond reasonable doubt. A few AFP officers in consultations also argued that the standard of proof should be beyond reasonable doubt. They argued that the disciplinary offences mirrored criminal offences and they should be subject to the same protections of the criminal law.<sup>481</sup>

### *Commission's view*

11.6 The Commission considers that the appropriate standard is the 'balance of probabilities'. As emphasised throughout this report the Commission considers that disciplinary matters should not be regarded as criminal or quasi-criminal. Disciplinary decisions should not be not punitive but instead protect the community and the reputation of the AFP.<sup>482</sup> Proper protection of the rights of officers can be achieved by a system of administrative review that will ensure that officers are accorded natural justice.

11.7 The Commission also notes that every jurisdiction other than South Australia has the standard of the balance of probabilities for its police disciplinary tribunals.

## **Recommendation 53 - Standard of proof**

The appropriate standard of proof should be in disciplinary review proceedings the 'balance of probabilities.'

## **Modified right to silence**

11.8 There are two different situations to consider: the right to silence during investigation and the right during a hearing.

### ***During an investigation***

11.9 The IID currently has power to compel answers from a member of the AFP.<sup>483</sup> There is no general right to refuse to answer on the ground of self-incrimination, but there is a proviso that the information so obtained will not be admissible in evidence against the person in any criminal or civil proceedings apart from a disciplinary proceeding or a proceeding relating to providing a false statement. The Ombudsman has the same power to compel answers when investigating an AFP matter, although this provision applies generally to any relevant witness.<sup>484</sup> However AFP appointees are cautioned and have the right to silence when questioned about a criminal offence. In the course of investigations, any evidence so obtained is only admissible in disciplinary proceedings and not in any subsequent proceedings<sup>485</sup> other than a prosecution for failing to provide information<sup>486</sup> or in an application by the Ombudsman to the Federal Court for an order compelling production.<sup>487</sup>

### ***Submissions and consultations***

11.10 A number of submissions stated that police should have a right to silence in respect of disciplinary matters.<sup>488</sup> Some AFP officers consulted said that it was unfair that they were singled out to have no right to silence during investigations into complaints. They compared their situation to the situation of complainants who were charged with making a false complaint and who did have a right to silence.<sup>489</sup>

11.11 The Commission also received submissions stating that the current position should be retained and that there should be no right to silence during the investigation although there should be a clear prohibition against the use of answers or of information derived from those answers.<sup>490</sup> The Ombudsman argued that the absence of a right to silence in misconduct investigations helps to promote an environment where AFP appointees believe they have a duty to report misconduct and to tell the truth when colleagues are investigated.<sup>491</sup> There was no support in the submissions for the UK model whereby a right to silence is available although adverse inferences can be drawn from the exercise of that right. The Victoria Police also supported the power to compel answers and production of documents in disciplinary hearings provided that the resulting information is clearly for use only in the disciplinary hearing and are not admissible against the officer in civil or criminal proceedings.<sup>492</sup>

### ***Commission's view***

11.12 The Commission does not support there being an unmodified right to silence during investigations concerning possible misconduct matters. The right to silence in the course of investigations is a traditional aspect of criminal investigation and proceedings. However, as argued in chapter 10, misconduct proceedings in relation to law enforcement officers are different in purpose and result when compared to criminal proceedings.

### ***During a hearing***

11.13 A person appearing as a witness before the Police Disciplinary Tribunal currently must answer questions that are required to be answered by the Tribunal and produce any document required to be produced. The penalty for non compliance is six months imprisonment. However there is a defence of reasonable excuse for non-compliance which includes the case where the answer or the production of the document may tend to prove that the person has committed an offence against a law or in the case of an AFP appointee, that the appointee has been guilty of a breach of discipline.<sup>493</sup>

### ***Submissions***

11.14 The Victoria Police stated that because disciplinary matters deal generally with the abuse of the powers entrusted to police or the failure to meet established standards, police officers should be subject to

compulsion in disciplinary hearings provided of course that the information was only admissible in the disciplinary field.<sup>494</sup> The NCA agreed that there should be no right to silence in hearings before the NIIC but that there should be restrictions on the use of this material.<sup>495</sup>

### *Commission's view*

11.15 The Commission considers that the NIIC when conducting a hearing should have the power to compel answers and the production of documents. Such information should not be admissible in evidence against the person in criminal or civil proceedings but should be admissible in misconduct proceedings. The Commission believes that the power to compel answers is integral to the NIIC being able to fully investigate complaints or allegations of corruption. The Commission sees the current Royal Commission into the NSW Police Service as providing support for the proposition that coercive powers are required if corruption within law enforcement agencies is to be combatted.

### *The AAT*

11.16 The current position of the AAT is that a refusal or failure to answer questions that a person is required to answer is an offence.<sup>496</sup> However the privilege to refuse to incriminate oneself in respect of a criminal matter is accepted by the AAT to be applicable in its jurisdiction.<sup>497</sup>

### *Submissions*

11.17 The AFP stated that serious consideration needed to be given to empowering the AAT to compel witnesses where they would otherwise claim a right to silence on the basis of possible self incrimination.<sup>498</sup> It stated that the power to compel an answer was essential if the AAT was to be able to properly determine integrity and employment suitability issues. Where the AAT compelled a witness to answer questions the usual protections and sanctions for false evidence should apply.

### *Commission's view*

11.18 The Commission's view is that the AAT must have access to the same information as the original decision-maker. If it does not then it cannot provide merits review of the decision. Therefore the AAT when reviewing AFP and NCA misconduct proceedings on review should be able to compel an officer to answer questions (provided those answers are given proper immunity from use in criminal or civil proceedings).

11.19 There is precedent for this type of immunity being adopted in the course of administrative review. Prior to the Security Appeals Tribunal (SAT) being abolished and the creation of a Security Appeals Division within the AAT the legislation governing the SAT provided that those appearing as witnesses before the Tribunal were not excused from answering a question or producing a document on the ground that the answer or document might tend to incriminate them. This was subject to the proviso that evidence of the answers given before the Tribunal would not be admissible in any civil or criminal proceedings other than proceedings relating to the giving of false evidence or contempt before the Tribunal.<sup>499</sup> The Attorney-General's Department recognised in its submission that there might need to be some changes made to the AAT's procedures in order to adequately deal with AFP and NCA matters.<sup>500</sup>

### **Recommendation 54 - Modified right to silence**

There should be no right to silence during investigations by the NIIC. However, as is currently the case for investigations by the IID, no information obtained under a direction should be admissible against the member in any civil or criminal proceeding other than misconduct proceedings. The IID's power to compel answers from a member of the AFP during an investigation should continue.

### **Recommendation 55**

The NIIC when conducting a hearing should have the power to compel answers and the production of documents. Such information should not be admissible in evidence against the person in criminal or civil proceedings but should be admissible in misconduct proceedings.

### **Recommendation 56**

The AAT should likewise have the same powers as those investigating complaints, that is, to compel answers and the production of documents when reviewing cases involving the AFP and NCA. However, evidence so given should not be admissible in criminal or civil proceedings apart from proceedings relating to contempt or giving false evidence before the Tribunal.

## **Derivative use**

11.20 A derivative use indemnity means that where an answer, document or thing is obtained from a witness under compulsion (apart from under a search warrant) any information, document or thing obtained as a direct or indirect consequence of the furnishing of the information, production of the document or giving of the evidence is not admissible against the witness.

11.21 The Senate Standing Committee for the Scrutiny of Bills has taken the view that the privilege against self incrimination is extremely important and has previously only accepted legislation which abrogates the privilege in situations where the information sought is particularly within the knowledge of the person concerned and there is immunity against the direct or indirect use of any information obtained other than in the matter in relation to which the information was sought.<sup>501</sup>

### ***Submissions***

11.22 The Attorney-General's Department in its submission stated that any departure from the inclusion of a use/derivative use immunity should occur only in exceptional circumstances.<sup>502</sup> The NCA stated that in order to encourage communication of information during misconduct proceedings evidence given should not be permitted to be used for other proceedings.<sup>503</sup>

### ***Commission's view***

11.23 The Commission considers that a derivative use immunity should be included in the immunities given in relation to the abrogation of the privilege against self incrimination for IID and NIIC investigations and hearings and during AAT review.

### **Recommendation 57 - Derivative use**

A immunity against derivative use should be included in the immunities given in relation to the abrogation of the privilege against self incrimination for the IID and NIIC investigations and hearings and during AAT review.

### ***A broader prohibition?***

11.24 The AFP in its submission argued for a broader prohibition on the use of evidence compelled in disciplinary proceedings. It wanted a prohibition against use in relation to AFP officers not only where officers are a party in civil or criminal proceedings but also where they are witnesses.<sup>504</sup>

11.25 The Attorney-General's Department submitted that if the material compelled is relevant to the credit of the AFP member or indeed to any issue in the proceeding in which the member is a witness, there is no reason for it to be treated any differently from other evidence in the proceedings. It argued that the immunity relates to protection of that person from prosecution or civil proceedings in which his or her legal rights are at stake, and should not extend to protecting police officers from assessment of the weight or credibility that should be attached to the evidence they give as witnesses in other proceedings.<sup>505</sup>

11.26 The Commission agrees with the Attorney-General's Department that there should be no prohibition against the use of compelled evidence in proceedings to which the party from whom the evidence was compelled is merely a witness. Police officers should not be given any special protection as to their credit but should be subject to the normal evidentiary rules. It should be for the relevant court or tribunal to determine the admissibility of any evidence in relation to witnesses.

#### **Recommendation 58**

There should be no prohibition against the use of compelled evidence in proceedings to which the party from whom the evidence was compelled is a witness.

### **Proceedings normally to be public**

11.27 Currently hearings are held in public except in special circumstances.<sup>506</sup> The Disciplinary Tribunal may direct that the hearing be private or restrict the publication or disclosure of evidence or its decision or findings if it is desirable in the public interest or because of the confidential nature of the evidence or matter. The Tribunal may also restrict or prohibit the publication or disclosure of any matters relating to the hearing including evidence decisions or findings.<sup>507</sup>

11.28 The AAT Act has a very similar provision.<sup>508</sup> Hearings before the AAT are to be in public although the Tribunal is able to direct that a hearing or part of a hearing take place in private where for example, the evidence is of a confidential nature.

#### ***Submissions***

11.29 The Victoria Police,<sup>509</sup> the AFP<sup>510</sup> and the NCA<sup>511</sup> supported this recommendation. The NCA commented that its support was subject to confidential or sensitive operational material being protected from public disclosure.

#### ***The Commission's view***

11.30 The Commission considers that the current AAT provision constitutes an appropriate balance between ensuring that the AFP, the NCA and the public have information about the working of the complaints systems and protecting the privacy and confidentiality of parties.

#### **Recommendation 59 - proceedings normally to be public**

Review of misconduct decisions by the AAT should be in public unless the AAT determines otherwise as currently provided for under the AAT Act s 35.

## **Parties to a decision**

11.31 Currently, there is no automatic right of appearance by complainants before the Tribunal. The Tribunal may grant leave to the complainant to appear or be represented if it is satisfied that there are special circumstances to justify this.<sup>512</sup>

11.32 The AAT Act provides that an application may be made by, or on behalf of, any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.<sup>513</sup> The AAT has defined 'are affected by the decision' broadly to mean that it is not necessary to show that pecuniary interests, or even specific legal rights are affected. In many cases it is conceivable that a complainant about the AFP or the NCA might well be able to satisfy this test. The Commission is concerned that, if a significant number of complainants were to seek review, this would detract from the main purpose of misconduct proceedings which is to maintain effective standards of conduct and employee suitability in law enforcement agencies. That should be achieved by the proper conduct of the matter by the AFP or the NCA and by their legal representatives.

11.33 To allow complainants to regularly intervene as parties would also increase costs and delays in the conduct of these proceedings. It is also likely to increase the prospect of the proceedings becoming more adversarial and more technical. If a complainant wishes compensation or restitution, the NIIC may make those recommendations or the complainant may institute civil actions. Currently if the Attorney-General considers that a penalty imposed upon a member by the Commissioner is inadequate, the Attorney may appeal the decision to the Tribunal.<sup>514</sup>

### ***DRP's proposals***

11.34 The DRP proposed that the AFP and NCA legislation should include a provision to the effect that for the purposes of the jurisdiction of the AAT 'persons affected by a decision' should be limited to the person who is the subject of the proceeding and to the Chairperson of the NIIC. The latter should be allowed to seek review of a decision where he or she considers that the AFP Commissioner or the NCA Chairperson has imposed a manifestly inadequate penalty. This is necessary to ensure that internal decisions are fair and adequate. It should be a rare occurrence for the NIIC to seek review. The Commission considered whether the power of the NIIC to report to Parliament about an inadequate penalty might be sufficient but is of the view that there must be an express provision for the NIIC to seek review so that any possible injustice in the particular case is reviewed directly and quickly. It would still be open to the NIIC to report on the penalties imposed generally or in relation to individual cases.

### ***Submissions***

11.35 A consultant to the inquiry suggested that the NIIC's discretion to seek review should be extended to situations where the NIIC was of the view that the penalty was 'inadequate' and not 'manifestly inadequate'. The AAT reviews on the merits and the 'manifestly inadequate' formula is a typical formula for courts of appeal that do not review on the merits.<sup>515</sup>

11.36 The Victoria Police stated that in Victoria the only person permitted to seek review of the decision is the member against whom the disciplinary sanction is imposed. In the Victorian system if penalties are seen to be manifestly inadequate then the hearing officer's capacity to discharge their duty may be called into question. The NCA agreed with the proposal put forward in the DRP.

### ***Commission's views***

11.37 For the reasons stated above there must be a power for the NIIC to seek review of a decision but complainants should not have this capacity. Disciplinary proceedings are concerned with the integrity and accountability of the agency and its officers and should not be an open forum for complainants. There are other more appropriate avenues for their seeking redress. The Commission accepts that a discretion limited to 'manifestly inadequate penalties' would be overly restrictive on the AAT and inconsistent with its usual broad range of merits review.

## **Recommendation 60 - parties to a decision**

The right to seek review by the AAT of a disciplinary decision should be expressly limited to the officer the subject of the action and to the Chairperson of the NIIC where he or she is satisfied that the penalty imposed is inadequate.

## **Limit on the availability of administrative review**

11.38 The DRP proposed that there should be a limit on the availability of administrative review by the AAT. The Commission argued that the imposition of minor sanctions was an integral part of management responsibility and to allow review reduces the capacity for management to provide leadership and responsibility for the health of the organization and that to allow review by the AAT of minor sanctions would needlessly increase costs and delays in the process. The DRP proposed that reprimands, counselling, training or retraining and any penalty that can be reduced to a monetary figure that is below a stipulated amount of penalty units should not be reviewable by the AAT. The Commission considered that currently a figure of \$500 would be appropriate.

### ***Submissions***

11.39 The NCA agreed with this proposal.<sup>516</sup> The Victoria Police supported this proposal on the grounds that it was consistent with the Victorian system which excluded review by the Police Review Commission (PRC) for sanctions under \$500, reprimands and adjournments conditional on good behaviour. Although PRC review on these sanctions was excluded an internal review mechanism was available. The Victoria Police advised that this internal review process was rarely used and it was currently under review as there was a belief that there was an acceptance by officers of the lower level sanctions.<sup>517</sup>

11.40 The Commission now considers that while some sanctions, such as a caution or counselling, might be regarded as apparently minor, for the officer in question they can have serious consequences. Such sanctions would remain on an officer's record and could be taken into account in any decisions regarding promotion or salary increases. The Commission considers that there would be sufficient disincentives for seeking administrative review for frivolous or vexatious matters, for example, by way of filing fees and legal costs.<sup>518</sup>

## **Recommendation 61 - Availability of administrative review**

There should be no limit on the availability of review by the AAT according to the type of sanction imposed. However, there would be a filing fee for making an application for review. The amount of the fee should be determined by considering such fees in other similar jurisdictions, particularly the AAT's jurisdiction.

## **Costs**

11.41 The Disciplinary Tribunal may order that costs incurred by the member be paid, in whole or part, by the Commonwealth.<sup>519</sup> However, the Commissioner cannot obtain a costs order against a member.

11.42 Currently the AAT cannot award costs except where it is specifically empowered to do so under the relevant primary legislation. The Commission in its report *Costs Shifting - Who Pays for Litigation*<sup>520</sup> has recommended that the AAT should have power to award costs. The Commission considered that the AAT should have a power to

- impose disciplinary and management costs orders to enhance compliance with AAT procedures and
- to make costs orders in favour of a party where it is satisfied that the order was required to permit the party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

11.43 The issue of costs was also dealt with by the Administrative Review Council (ARC) in its report *Better Decisions: review of Commonwealth Merits Review Tribunals*.<sup>521</sup> The ARC recommended that review tribunals should be able to award costs against any person involved in a review proceeding who in the tribunal's opinion has deliberately engaged in inappropriate conduct that resulted in another person incurring unnecessary costs.<sup>522</sup>

### ***DRP's proposals***

11.44 The DRP proposed that the legislation for the AFP and NCA should provide that the AAT may award costs. The legislation should provide that generally each party would bear their own costs but costs orders could be made where the AAT:

- made a decision more favourable to the applicant; then the AAT should be able to order that all or part of the costs of the proceedings should be paid by the respondent
- if satisfied that the application for review is wholly unreasonable or frivolous; then it may order that the applicant pay all or part of the costs of the proceedings
- determines to impose its own disciplinary and case management orders to enhance compliance with AAT procedures
- is satisfied that an order for costs is necessary to permit the party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

### ***Submissions***

11.45 The Attorney-General's Department indicated that at this stage it is unable to support the recommendation in the DRP that the AAT be given the power to award costs where the AAT makes a decision more favourable to the applicant.<sup>523</sup> It suggested that the provisions relating to costs should await the Government's response to the Commission's report on costs and also to the ARC's report on merit review tribunals.

11.46 The Victoria Police stated that costs issues do not arise in Victoria as legal practitioners are excluded from the process and the emphasis is on the conduct alleged rather than on an assessment of who presents the best argued case in disciplinary proceedings.<sup>524</sup>

11.47 The AAT in its submission<sup>525</sup> supported the draft recommendation as did the NCA.<sup>526</sup>

## **Recommendation 62 - Costs**

The legislation for the AFP and the NCA should provide that the AAT may award costs. It should also provide that as a general rule each party should bear their own costs but also specify the following exceptions where the AAT

- makes a decision more favourable to the applicant - then the AAT should be able to order that all or part of the costs of the proceedings should be paid by the respondent
- is satisfied that the application for review is wholly unreasonable or frivolous - then it may order that the applicant pay all or part of the costs of the proceedings
- determines to impose its own disciplinary and case management costs orders to enhance compliance with AAT procedures
- is satisfied that an order for costs is necessary to permit the party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

## Individual liability for costs

11.48 Another issue is the liability of individual AFP appointees to pay legal costs when their misconduct was directly responsible for charges against an individual being dismissed or for a person being wrongly charged in the first place. Until now the AFP has met costs awarded against the informant. The AFP has submitted that as it may be vicariously liable for the actions of AFP appointees there are strong arguments in favour of leaving the recovery of costs within the existing framework.<sup>527</sup>

### *Commission's view*

11.49 The AFP has submitted that the current situation does not prejudice it and in those circumstances the Commission does not advocate any change.

### **Recommendation 63 - Individual liability for costs**

There should be no statutory discretion for the AFP Commissioner or the Chairperson of the NCA to be able to require an individual officer to pay all or part of the agency's legal costs where the Commissioner or Chairperson is satisfied that the officer's misconduct was intentional or reckless and led to charges against an individual being dismissed or for a person being wrongly charged in the first place.

## Legal assistance

11.50 The DRP raised the question whether law enforcement officers who were the subject of complaints and or misconduct proceedings should receive legal assistance from the Commonwealth. One argument is that the proper determination of complaints and or misconduct proceedings is in the public interest and consequently accused officers should receive public funding in order to meet their costs particularly where reputation and career are at stake. While making no recommendation, ALRC 9 drew attention to the deficit in provision of funding by Police Associations. This was alluded to in recent consultations with the AFPA.<sup>528</sup> ALRC 9 stated that where the complainant is granted leave to be represented and costs are borne by the Commonwealth, then justice would require that similar assistance should be made available to the police officer.

11.51 The AAT Act provides that an applicant or intending applicant may apply to the Attorney-General for legal or financial assistance to enable the action to be brought.<sup>529</sup> This provision does not prevent a person from applying for legal aid.

### *Submissions*

11.52 A number of submissions agreed that AFP or NCA staff who are the subject of disciplinary proceedings arising out of a complaint should be entitled to seek legal assistance from the Commonwealth.<sup>530</sup> The NCA agreed that the current AAT provision should continue to apply.<sup>531</sup>

### *Commission's view*

11.53 The Commission's view is that the current AAT provision should continue to apply as it allows appropriate consideration of requests for special legal assistance.

### **Recommendation 64 - Legal assistance**

The current AAT provision about legal assistance should apply for the review of AFP and NCA misconduct decisions.

## Appeals from the Tribunal

11.54 Currently parties who have had matters determined by the Disciplinary Tribunal may appeal to the Federal Court on any question of law or on the grounds that a penalty imposed is unduly severe or inadequate.<sup>532</sup> A question of law includes whether there was sufficient evidence to justify a finding of fact. In addition, the Tribunal may refer a question of law to the Full Court of its own motion or on the application of a party.<sup>533</sup> All appeals from the FPDT are currently heard by the Full Court of the Federal Court.<sup>534</sup>

11.55 Under the AAT Act there is a right of appeal to the Federal Court on a question of law although only appeals from decisions of Presidential members are required to be heard by the Full Court.

### *Submissions*

11.56 The NCA<sup>535</sup> and AFP<sup>536</sup> both agreed there should be a right of appeal from the AAT to the Federal Court.

### *Commission's view*

11.57 There should be a right of appeal on a question of law to the Federal Court in accordance with the existing procedures of the AAT. This is clearly the most appropriate forum for appeals.

### **Recommendation 65 - Appeals**

There should be a right of appeal on a question of law to the Federal Court in accordance with the existing procedures of the AAT.

## Reforms to disciplinary proceedings

### *Removal of inappropriate terminology*

11.58 The Commission considers that the terms 'discipline' or 'disciplinary' should be removed from the legislation and the term 'misconduct' substituted. Discipline has connotations of the para-military model that should be avoided. All language that has usage in criminal matters should also be avoided such as 'guilt' and 'offences' and 'charges'. As discussed at paragraph 11.6 these proceedings should not be regarded as quasi-criminal or criminal. Instead the language of breach of the terms of an appointment should be used.

### *Submissions*

11.59 The Victoria Police expressed the view that the use of the term misconduct was a distinct weakening of the language.<sup>537</sup> It argued that the more severe the terminology used to describe the behaviour, the more useful it is in terms of preventative strategies including symbolically to members of the organization.

11.60 The AAT on the other hand supported the proposed changes of terminology and the management model.<sup>538</sup> The NCA also expressed no objection to the change in terminology.<sup>539</sup>

### *Commission's views*

11.61 The Commission considers that 'discipline' is an inappropriate term that does connote a para-military model. In the Commission's view the term 'misconduct' is appropriate and does not reduce the significance or seriousness of the proceedings. It clearly encompasses the failure to comply with proper standards of conduct.

### **Recommendation 66 - Removal of inappropriate terminology**

The terms 'discipline' or 'disciplinary' should be removed from the legislation and the term 'misconduct' substituted. All language that has usage in criminal matters should also be avoided in the legislation such as 'guilt' and 'offences' and 'charges'.

#### ***Need for negligence proceeding***

11.62 The proceeding that an appointee was negligent or careless in the discharge of his or her duties was removed when s 26E of the AFP Act was introduced. The rationale for this removal was that s 26E was to be the procedure to deal with negligent conduct. However, as the DRP noted, s 26E cannot be regarded as a complete substitute for negligence offences because it provides for retirement only. There will be cases of negligence where retirement would be an excessive outcome. The Commission is of the view that negligence offences should be available to deter behaviour that results in significant consequences such as the loss of public revenue.

#### ***Submissions***

11.63 The Ombudsman stated that a disciplinary offence concerned with negligence might be preferable where the negligent actions have had serious consequences including to complainants but that apart from this the existing disciplinary offences were adequate.<sup>540</sup> No submission opposed this proposal.

### **Recommendation 67 - Need for negligence proceeding**

A misconduct proceeding that an appointee was negligent or careless in the discharge of his or her duties should be included in the AFP misconduct legislation.

# 12. ADR, sanctions and provision of information

## Introduction

12.1 Chapter 10 discussed the existing AFP and NCA misconduct processes and presented the Commission's recommendations for systems based on managerial responsibility and administrative review. This chapter examines

- the use of ADR to resolve complaints
- sanctions where misconduct is established and
- providing information to complainants and to officers who are the subject of misconduct proceedings
- the legislative structure of the disciplinary systems.

## ADR

### *Greater scope for ADR*

12.2 Currently Alternative Dispute Resolution (ADR ) tends to be used to resolve minor complaints only under the AFP complaints system. There is no legislative provision to determine when ADR should be used in relation to complaints against the NCA.

12.3 However the Commission considers that ADR is currently not being fully utilised. Figures from the 1995-1996 Annual Report show that 145 or 12.9% of complaints were reconciled under s 6A of the Complaints Act while 63 or 5.6% of complaints were conciliated under s 6B of the Complaints Act. The Commission considers that about 70% of all complaints should be suitable for informal resolution or mediation. They can be categorised as minor complaints. The process for those complaints is discussed in chapter 15. In some circumstances ADR might be used for more serious complaints.

12.4 There are advantages in the use of ADR for a wider range of complaints. From the perspective of the public interest, ADR may offer the most effective way of actually changing individual police officers' attitudes and behaviour. It might best cater to the needs of individual complainants who, according to survey evidence, often do not want formal disciplinary action taken but instead want the police officer to understand the complainant's feelings and point of view and to modify his or her own behaviour. Some complainants, but certainly not all, also want a face to face meeting with the police officer to discuss the incident. Moreover, many complainants see delay as a major problem and it is the formal investigation and determination of complaints that is likely to take much longer than ADR. Police officers might generally prefer an ADR approach because there is no intensive investigation or risk of a conviction for a disciplinary offence.

12.5 Some disadvantages may be that police may feel pressured to 'accept' ADR when they believe they are not guilty of any misconduct. Complainants may also be pressured by the police to accept ADR because it will let the individual officer 'off the hook' on disciplinary charges. The systemic problems that a complaint may identify may be less likely to be addressed if ADR is used because it tends to be a less public process than a formal investigation and hearing.

### *DRP proposal*

12.6 The DRP proposed that the legislation should not prescribe in any detail what types of complaints other than those classified as minor are suitable for ADR but the NIIC should be able to determine any guidelines for its use taking into account for example, the seriousness of the complaint, the public interest, the wishes of the complainant, whether the alleged misconduct was deliberate or inadvertent and whether investigation will be more effective in resolving the complaint. However, any ADR undertaken by the AFP or the NCA should be subject to the approval of the NIIC and monitored by the NIIC. The NIIC should be able to develop guidelines with these agencies about the use of ADR in cases that are not categorised as minor.

## ***Responses to DRP***

12.7 The National Alternative Dispute Resolution Advisory Council (NADRAC) established pursuant to the previous government's Justice Statement of 1995 has made a number of suggestions about the Commission's proposals. It has pointed out that the term conciliation in the *Complaints (Australian Federal Police) Act 1981* (Cth) is not defined and that the Commission's use of mediation in its issues paper and DRP was also undefined. As the terms are often used in widely differing ways there was a question as to what exactly is being referred to.<sup>541</sup> NADRAC is currently developing definitions for different ADR processes. It is also developing a system for accreditation of mediators.

12.8 NADRAC also queried whether the proposed mediation service provider was to be internally or externally based. It stated that mediation is a procedure which involves a neutral third party and that using an internal mediator would jeopardize this neutrality and was likely to discourage complainants from using the dispute resolution system. Using an internal mediator within a hierarchical organization such as the AFP was likely to compound the problems of neutrality. NADRAC expressed the view that using mediation within a hierarchical organisation should be carefully considered. NADRAC also queried what training or accreditation was to be required for mediators and how they were to be selected. It also stated that although the Commission had proposed that the NIIC would monitor the provision of ADR services it was not clear whether this body would have the necessary expertise to do so.

12.9 NADRAC also stated that it would be inappropriate for complaints involving serious allegations of sexual harassment to be dealt with internally by way of ADR processes. More generally it considered that the determination as to which complaints are appropriate for ADR was a sensitive issue and that any such determination should be made according to objective criteria. It suggested in its earlier submission that there will be cases where ADR should not be considered but the critical factors in these determinations are likely to be the characteristics of the particular case rather than the type of dispute.

12.10 It was also concerned that ADR should not become a replacement for good management. It submitted that although the fact of referral to ADR should be included in an officer's record, other information with respect to ADR proceedings, should not be incorporated. It submitted that the recording of referrals was necessary to ensure the fact that an officer had multiple referrals to ADR was not hidden.

12.11 NADRAC supported the proposal for time limits in the ADR process provided that there was room for flexibility in those time limits if there was evidence of movement from parties who were genuinely engaged in the process. It was also of the opinion that ADR should never be compulsory for complainants but acknowledged that there were some situations where it should be compulsory for the law enforcement officer although it considered that this was probably a matter for internal police management decisions. The Attorney-General's Department submitted that since mediation commonly involves the intervention of a third party who, from a position of apparent neutrality, assists the disputants towards an agreed outcome, that the mediator should not be a police officer in relation to complaints against police. The Department also submitted that attention should be given to providing appropriate selection criteria for mediators. It also expressed concern about the use of mediation within a hierarchical organisation such as the AFP.

## ***Commission's view***

12.12 The Commission supports the use of both informal resolution such as the pilot workplace resolution scheme and mediation for appropriate cases. It recommends that methods such as the workplace resolution scheme should deal with the bulk of complaints being dealt with by ADR and that mediation should be used only in those more serious cases where it appears to be more appropriate. Workplace resolution refers to the pilot scheme where resolving supervisors above are able to resolve non-serious complaints with review both by the IID and the Ombudsman to ensure accountability.

12.13 The Commission is using the term 'mediation' to refer to a situation where an independent third party facilitates the parties reaching a consensual agreement. Given the nature of mediation the Commission considers that it is inappropriate for dealing with the majority of complaints because

- it tends to be both time and labour intensive

- it tends to reduce managerial responsibility
- many complainants will not wish to take part in it
- it will increase costs if it is used indiscriminately.

12.14 If mediation is to be used in relation to police complaints the outcomes of mediation must be carefully monitored both on an individual and a systemic level. On the individual level there needs to be monitoring to ensure that an individual is not the subject of repeat complaints. On the systemic level mediation and the types of complaints that are being sent for mediation need to be monitored to ensure that complaints that raise important issues of public concern or interest are not being pushed into mediation where the issues of public concern may not be adequately acknowledged.<sup>542</sup>

12.15 Under the Commission's proposed system the NIIC in conjunction with the AFP and NCA should conduct a review of the informal resolution schemes currently being conducted both in Australia and overseas. After consultation with NADRAC and other peak bodies it should develop appropriate definitions of the types of resolution to be used including informal resolution and mediation

- mediators should be independent and have appropriate training
- guidelines about the use of ADR for different types of complaints including sexual harassment cases
- time limits are appropriate but should be subject to flexibility where there is genuine evidence of a matter being resolved.

12.16 The use of informal resolution for appropriate cases as determined by guidelines developed by the NIIC and the AFP and the NCA should be encouraged. Its implementation rate and effectiveness should be monitored and audited by the NIIC.

### **Recommendation 68 - Principles for ADR**

The NIIC in consultation with the AFP and NCA and peak ADR bodies should develop a series of principles and guidelines to determine the use of ADR for complaints. This should include

- in consultation with NADRAC and other peak bodies developing appropriate definitions of the types of resolution to be used including informal resolution and mediation
- a policy that mediators should be independent and have appropriate training
- guidelines about the use of ADR for different types of complaints including sexual harassment cases
- guidelines about time limits but they should be subject to flexibility where there is genuine evidence of a matter being resolved.

### **Recommendation 69 - use of informal resolution**

The use of informal resolution for appropriate cases as determined by guidelines developed by the NIIC and the AFP and the NCA should be encouraged. Its use and effectiveness should be monitored and audited by the NIIC.

### ***Should ADR be compulsory in any case?***

12.17 The DRP proposed that complainants should not be required or pressured into agreeing to any form of ADR. The officer's consent for informal resolution of minor matters should not be required. In all other cases the officer's consent for participating in ADR should be necessary.

12.18 All submissions which addressed the issue agreed that ADR should only be used where the complainant consented to such a procedure.<sup>543</sup> The AFP stated that informal resolution relies greatly upon the parties involved co-operating and having a positive attitude towards the process. It said that there was little

merit in legislating to compel AFP appointees to attend informal resolution as the AFP could already direct appointees to attend. It said that despite any requirement for an AFP appointee to participate in the informal resolution of a complaint, mediation of a complaint should not be attempted unless the appointee consented to the mediation process.<sup>544</sup>

### *Commission's view*

12.19 Informal resolution should only ever be used where the complainant consents to the process. The officer's consent for informal resolution of minor matters should not be required but there should be no legislatively prescribed sanction for an officer refusing to attend or co-operate in an ADR process. In all other cases the officer's consent for participating in ADR should be necessary. However guidelines should be developed to identify circumstances where it is appropriate for management to take these matters into account in assessing officers' performances.

### **Recommendation 70 - Should ADR be compulsory in any case?**

Complainants should not be required to agree or be pressured into agreeing to any form of ADR. The officer's consent for informal resolution of minor matters should not be required. In all other cases the officer's consent for participating in ADR should be necessary.

### *Admissibility of statements*

12.20 Currently evidence of a statement made and answer given by an AFP appointee in the course of an attempt to resolve the complaint under these conciliation procedures is not admissible against the appointee in any proceedings including proceedings in relation to a breach of discipline.

12.21 The DRP suggested that this provision should continue as it encourages officers to use ADR but that statements made by officers should be able to be used for purely employment related purposes.

### *Submissions*

12.22 The AFP submission to the issues paper stated for ADR processes to be successful both the complainant and the member needed to feel free to be able to discuss the complaint without fear and that if statements were able to be used for criminal, civil or disciplinary proceedings it would tend to discourage open and frank participation in the process.<sup>545</sup> The Victoria Police argued in their submission to the DRP that there should be no use of statements made during ADR for employment related purposes. They stated that it was necessary to create an environment where the subject member was not afraid to admit errors or mistakes.<sup>546</sup>

### *Commission's view*

12.23 The Commission has reconsidered this issue in light of the importance of encouraging parties to be full and frank in the process so there is a greater chance for a successful outcome. Therefore the only aspects of the mediation that should be recorded are the agreed outcomes. No statements made by an AFP appointee during the mediation process should be available or admissible against the appointee for either proceedings or for employment related purposes

### **Recommendation 71 - Admissibility**

Statement 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.

### *ADR and official records*

12.24 In Queensland for both informal resolution and mediation there are no details recorded on the police officer's file. This is also the case in England. The argument for such an approach is that it is necessary to

encourage police to participate in the process and to admit responsibility where appropriate. One possible problem is that there may be officers who are subject to many complaints resolved informally but there is no disciplinary action available and there is no recording on their file. It might be argued that it would be desirable to have a system of monitoring ADR in relation to individual officers, not on their personal files, but for management purposes. It could be difficult, however, to maintain this distinction. Within the AFP, information about complaints that have been informally resolved is held by IID. These records are however available to Employment Standards for reference in relation to reappointment or possible action under s 26E.

12.25 In the DRP the Commission proposed that the AFP and the NCA should have a full profile of their staff and that details of ADR should be recorded preferably on performance review documents.

12.26 Submissions favoured a variety of proposals, from no record,<sup>547</sup> to recording only the fact that conciliation had taken place,<sup>548</sup> to recording only upheld ADR complaints.<sup>549</sup> The Ombudsman thought that information about the outcomes of ADR and complaints should be available to management for use in supervisory contexts and for assessment of suitability although there was a question about whether individual files were the most appropriate place to record this information.<sup>550</sup> The AFP stated that details of the outcomes of ADR should continue to be recorded.<sup>551</sup>

### ***Commission's view***

12.27 The Commission is of the view that a record should be kept of both referral to ADR and also the outcome of the ADR process. Such records might be kept on performance review documents rather than personnel files but there must be a co-ordinated system that provides a full employment history and profile.

### **Recommendation 72 - ADR and official records**

The AFP and NCA should keep records of both referral to ADR and also the outcome of the ADR process. Such records might be kept on performance review documents rather than personnel files but there must be a co-ordinated system that provides a full employment history and profile.

### ***Time limits***

12.28 The Commission in the DRP asked what were the minimum requirements for informal resolution and whether there should be time limits placed on the process through legislation.

### ***Submissions***

12.29 Time limits were supported by most submissions<sup>552</sup> which commented on this issue although the Ombudsman suggested that the limits should be provided through guidelines rather than in legislation as this would allow the limits to be fine tuned as practical experience with them was gained. The Attorney-General's Department and NADRAC both suggested that the time limits should be flexible in situations where there was evidence of movement by the parties.<sup>553</sup>

### **Recommendation 73 - Time limits**

Any time limits imposed on the alternative dispute resolution process should be flexible to allow for situations where there is genuine evidence of movement between the parties.

### ***Conferencing***

12.30 The DRP asked for views about the possible adaption of diversionary conferencing for use in the context of police complaints. Conferencing has primarily been used in the context of juvenile justice to divert offenders out of the criminal justice system. Offenders who are willing to admit the offence are offered the option of a conference rather than the traditional court process. In one pilot scheme operating in the ACT the conferences are organised by the police and are attended by the victim(s) and their supporters (family and

friends) the offender(s) and their supporters and are facilitated by a trained police facilitator. Both the offender and victim and their supporters are given the opportunity to discuss the offence, the reasons behind it, the consequences of it and the way it has affected each of the parties. The aim of conferencing is to have offenders understand the consequences of their behaviour and to take responsibility for their actions. The conference facilitator attempts to draw up a plan that is acceptable to all parties present and to monitor the implementation of that plan.

12.31 Early evaluation of a conferencing scheme run at Wagga Wagga has suggested that levels of both victim and police satisfaction were high. However, there have been a number of critiques of the diversionary conferencing system.<sup>554</sup> The AFP has indicated that conferencing would never be appropriate for corruption offences.<sup>555</sup> NADRAC has stated that it does not support the use of conferencing or 'shaming' as it called it in the context of complaints against the AFP or NCA. It argued that 'shaming' is a process which should be only used with the utmost caution particularly where a hierarchical organization is involved.<sup>556</sup> Professor John Braithwaite, a leading authority in this area, has expressed the view that conferencing may be useful in the context of police complaints and should be considered.<sup>557</sup>

### ***Commission's view***

12.32 The Commission knows of no situation where diversionary conferencing has been adapted for use in the area of police complaints. It notes the diversity of views over the use of conferencing in the juvenile justice area and acknowledges that evaluation of this process is still occurring. Under these circumstances the Commission believes that the AFP and NCA should consult with peak bodies about the use of conferencing and if it is considered a worthwhile option for some types of complaints should consider conducting a feasibility study.

### **Recommendation 74 - Conferencing**

The AFP and NCA should consult with peak bodies about the use of conferencing in these areas and if it is considered a worthwhile option to explore for some categories of complaints should consider a feasibility study with appropriate guidelines and reporting.

## **Sanctions**

12.33 Sanctions or penalties for misconduct are imposed in order to protect the public rather than to punish the wrongdoer and to ensure that the wrongful action does not recur.<sup>558</sup> This was the view taken by the Federal Court in *Hardcastle v Commissioner of Police* when it said

the object of disciplinary proceedings under the Discipline Regulations is to protect the public, to maintain proper standards of conduct by members of the Australian Federal Police and to protect the reputation of that body. The object of disciplinary proceedings is not to punish.<sup>559</sup>

### ***Suspension of duty before determining action***

12.34 Currently where it appears that an AFP appointee may have committed a disciplinary offence the Commissioner has a discretion to suspend the appointee until the proceedings have been determined.<sup>560</sup>

### ***DRP's proposals***

12.35 The DRP proposed that this provision should continue with the following additional elements to clarify the consequences of a suspension:

- the AFP Commissioner should be able to approve where appropriate an appointee undertaking paid employment during the period of the suspension
- immediately upon being suspended, an appointee must surrender his or her certificate of identity, uniform and equipment issued to him or her for the performance of his or her duties

- an appointee who does not surrender the above things is guilty of an offence and a warrant may be issued to search for those things and to seize them
- an appointee who has been suspended must comply with an order to return temporarily to work - a failure to comply would be an offence
- an appointee who is suspended must not, while on suspension, enter any police premises, other than those areas available to the public, unless under a direction to do so - a penalty would apply to a breach of this requirement.

### *Submissions*

12.36 The Victoria Police supported this submission stating that each of the suggested extensions to the power to suspend was consistent with existing Victorian legislation.<sup>561</sup>

### *Commission's views*

12.37 The Commission considers that the proposal in the DRP clarifies the position in relation to suspension and provides the Commissioner with an appropriate range of options.

### **Recommendation 75 - Power of suspension**

The power of suspension should continue with the following additional elements

- the AFP Commissioner should be able to approve where appropriate an appointee undertaking paid employment during the period of the suspension
- immediately upon being suspended, an appointee must surrender his or her certificate of identity, uniform and equipment issued to him or her for the performance of his or her duties
- an appointee who does not surrender the above things is guilty of an offence and a warrant may be issued to search for those things and to seize them
- an appointee who has been suspended must comply with an order to return temporarily to work - a failure to comply would be an offence
- an appointee who is suspended must not, while on suspension, enter any AFP premises, other than those areas available to the public, unless under a direction to do so - a penalty would apply to a breach of this requirement.

### *Current sanctions*

12.38 The sanctions for a breach of an AFP disciplinary offence are provided for in the AFP (Discipline) Regulations. Where the Commissioner determines that an appointee is guilty of a disciplinary offence the Commissioner may

- admonish, caution or reprimand the appointee
- impose a fine of a maximum not exceeding the amount equalling the salary for five days
- reduce the salary to a rate that is not lower than the lowest salary for that rank
- reduce the appointee to a lower rank
- dismiss the appointee.<sup>562</sup>

12.39 Superannuation orders may be made for relevant disciplinary offenses as discussed below.

### ***Dealing with minor misconduct without a misconduct proceeding***

12.40 The DRP proposed that in response to minor cases of misconduct supervisors and managers should be able to take positive, direct and immediate responses including requiring attendance at counselling or training programs or issuing caution notices. These notices should be able to be issued on the spot. The Victoria Police has introduced similar measures. A failure to respond to these lower level measures might result in a misconduct proceeding being commenced.

#### ***Submissions***

12.41 The AFP stated that there appeared to be little distinction between the existing penalties of admonishment, caution and reprimand and that it would therefore be appropriate to abolish the use of admonishments. It agreed that cautions should be used as a warning to an appointee while reprimands should be the base penalty available.<sup>563</sup> The Victoria Police supported this recommendation stating that their system had operated successfully for the last three years.<sup>564</sup>

#### ***Commission's views***

12.42 The capacity to deal with minor misconduct without formal proceedings would give management greater flexibility to provide the appropriate sanction or outcome for minor matters. The penalty of admonishment is unnecessary and should be removed from the regulations.

### **Recommendation 76 - Dealing with minor misconduct**

For minor cases of misconduct, supervisors and managers should be able to take positive, direct and immediate responses including requiring attendance at counselling or training programs or issuing Caution Notices. These should be able to be issued on the spot. A failure to respond to these lower level measures may result in a misconduct proceeding being commenced.

The penalty of admonishment should be removed from the regulations.

#### ***Telegraphing penalties***

12.43 Currently if a disciplinary charge is laid, other than pursuant to the Complaints Act, the system provides for 'telegraphing of penalties' by which the Commissioner must inform the member of the penalty which will be imposed if the member pleads guilty at that stage.<sup>565</sup> The member may choose to accept the penalty or to proceed to defend the charge before the Tribunal. Under the current system, the range of penalties telegraphed are described as too broad (eg ranging from deduction of several days' pay to dismissal) which prompts members to seek determination by the Disciplinary Tribunal. The AFPA has stated that there is a need for review of the practice of telegraphing.<sup>566</sup>

#### ***Commission's views***

12.44 The Commission considers that a discretion to telegraph penalties would be a useful option for all disciplinary proceedings. It would help to prevent unnecessary hearings of matters. The Commission believes that the following provisions would achieve that objective without putting any pressure on officers the subject of proceedings to admit responsibility.

12.45 The AFP Commissioner should have a discretion to advise an AFP appointee, who is the subject of a disciplinary proceeding, of the penalty, or the range of penalty, that the Commissioner would impose if he or she were to find that the action against the officer was sustained. The legislation should provide that the AFP appointee who is the subject of the action may request the Commissioner to exercise that discretion. It should be for the Commissioner to determine in a particular matter to what extent the penalty will be specified. However, the Commissioner should be bound by any indication given if the matter proceeds to the determination of the penalty. No inference as to responsibility should be able to be drawn from the fact that an AFP appointee has sought an indication of penalty in any matter where that appointee subsequently contests the proceeding.

## **Recommendation 77 - Telegraphing penalties**

The AFP Commissioner should have a discretion to advise an AFP appointee, who is the subject of a disciplinary proceeding, of the penalty, or the range of penalty, that the Commissioner would impose if he or she were to find that the action against the officer was sustained.

The legislation should provide that the AFP appointee who is the subject of the action is able to request the Commissioner to exercise that discretion. The Commissioner should determine in a particular matter to what extent the penalty will be specified. The Commissioner should be bound by any indication given if the matter proceeds to the determination of the penalty. No inference as to responsibility on the part of the appointee should be able to be drawn from the fact that the appointee has sought an indication of penalty in any matter where that appointee subsequently contests the proceeding.

### ***Sanctions after a misconduct proceeding***

12.46 In the DRP the Commission proposed that the following outcomes should be available for situations where the Commissioner finds a misconduct proceeding proved.

#### ***(a) Reprimand***

#### ***(b) Counselling, training or retraining***

***(c) Fines.*** A fine linked to salary seems an inappropriate measure of penalty given that salaries vary considerably. For example, two officers could be liable for the same misconduct but could receive significantly different penalties on the basis of their different salaries. While in some cases this could be appropriate to reflect their different responsibilities and positions of trust, in other cases it may not. The Commission considers that the most effective means of ensuring that monetary penalties continue to be consistent and able to reflect changes in inflation is for them to be provided for by penalty units as is now common in legislation dealing with fines. Without being prescriptive a maximum at the moment of say \$5 000 might be appropriate.

***(d) Reduction in rank or seniority.*** There should be a sanction available to reduce the rank or seniority of a person including a power to reduce the rank or seniority for a set period of time and then a return to the previous rank or seniority. The AFP should also be able to suspend these reductions if the officer complies with specified conditions. A failure to comply would allow the AFP to enforce the reduction. The Commission recognises that the AFP has removed a number of ranks and is currently in the process of restructuring the organisation and that it is likely that the reduction of an appointee in rank will not be an appropriate penalty in the future. However the AFP has indicated that this issue should be addressed when the structural changes to the AFP have been finalised.

***(e) Reduction in remuneration.*** This sanction should be available because reducing rank or seniority may not always result in a reduction in remuneration.

#### ***(f) Transfer to other duties***

#### ***(g) Dismissal***

### ***Submissions***

12.47 The AFP agreed that the current provisions which restricted fines to no more than 5 days pay at the member's salary were restrictive. It also pointed out that currently under regulation 22(2) of the AFP (Discipline) Regulations the Commissioner does not have access to the full range of penalties for a disciplinary offence under regulation 18(1)(h). The AFP argued that this restriction could lead to situations where the only penalties available were inappropriate.<sup>567</sup>

### *Commission's view*

12.48 The Commission is of the view that the AFP Commissioner should have a discretion to apply the full range of penalties for all misconduct proceedings and that therefore regulation 22(2) of the AFP (Discipline) Regulations should be amended to ensure that the Commissioner has access to the full range of penalties.

#### **Recommendation 78 - Sanctions**

The following sanctions should be available to the Commissioner in all situations where a misconduct proceeding is proved

- reprimand
- counselling, training or retraining
- fines
- reduction in rank or seniority
- reduction in remuneration.

#### **Recommendation 79**

Regulation 22(2) of the AFP (Discipline) Regulations should be amended to ensure that the Commissioner has access to the full range of sanctions in all cases.

### **Should superannuation orders be available?**

#### *Current superannuation provisions*

12.49 Under the AFP Act, persons may be subject to an order against their superannuation as a penalty if they are found guilty of

- a corruption offence and sentenced to more than 12 months imprisonment or
- a 'relevant disciplinary offence' and dismissed from the AFP as a result.<sup>568</sup>

The first circumstance reflects the superannuation orders for corruption offences that can be made against all Commonwealth employees under the *Crimes (Superannuation Benefits) Act 1989* (Cth) (the CSB Act). However the second circumstance for a relevant disciplinary offence is unique to the AFP as no other Commonwealth employee is liable to such a sanction for a disciplinary matter. Under the AFP Regulations a 'relevant disciplinary offence' means any improper use by an AFP appointee of the fact that he or she is an AFP appointee in the course of the commission of a particular disciplinary offence and, in particular, acts which;

- constitute disgraceful or improper conduct either in an official capacity or otherwise
- are prejudicial to the good order and discipline of the AFP
- are likely to discredit the reputation of the AFP
- or which lead to the AFP member being charged before the court with an offence against the Commonwealth, State or Territory or another country where that charge is proved to the satisfaction of the court whether or not the court proceeds to conviction, and
- any act by an AFP member to aid, abet, counsel, procure or be knowingly concerned in or party to the commission of any disciplinary offence.<sup>569</sup>

12.50 The CSB Act and the equivalent provisions of the AFP Act can be seen as part of the wider range of legislation in Australia which allows for the proceeds of crime to be traced, frozen and confiscated.<sup>570</sup> The

legislation is intended to ensure that offenders do not profit from their crimes, to incapacitate offenders from committing further crimes and to deter offenders.<sup>571</sup>

12.51 The rationale for proceeds of crime legislation is to prevent unjust enrichment and to prevent offenders from enjoying the proceeds of their crime. The legislation is thus predicated upon the commission of criminal offences. The only current exception to this is the AFP legislation for relevant disciplinary offences.<sup>572</sup>

### ***DRP proposals***

12.52 The DRP proposed that deducting the whole or a portion of the employer's contribution should be available. It also suggested that the availability of the sanction for disciplinary offences might be extended to all public sector personnel in the interests of consistency and fairness. The Commission acknowledged that this extension of the sanction was outside its current terms of reference.

12.53 The Commission also proposed that s 26F of the AFP Act which allows the Commissioner to end an appointment on the ground of serious misconduct should be amended so that the Commissioner would have a discretion to seek a reduction, total or partial, of the employer's contribution to superannuation and interest on that amount in relation to cases of serious misconduct under s 26F which

- involved an abuse by the person of his or her office
- are committed for a purpose that involved corruption or
- are committed for the purpose of perverting or attempting to pervert the course of justice.<sup>573</sup>

12.54 The rationale for that suggestion was that those people retired under s 26F for cases involving serious misconduct that satisfy the above criteria should not receive a full redundancy package. In such a case the Commission considered that the retiree has forfeited the right to the total employer contribution.

### ***Submissions***

12.55 The NSW ICAC submitted that sanctions for disciplinary offences should include a loss of the employer contribution and interest thereon.<sup>574</sup> However the AFP, the AFPA and individual AFP members have expressed concern about the availability of superannuation orders for disciplinary offences and the proposal that this should be extended to cases of dismissal for serious misconduct under s 26F. The AFPA argued that superannuation orders

- adversely affect the families of the members involved
- are draconian and out of proportion to the disciplinary offences committed and
- unfairly single out AFP employees.<sup>575</sup>

12.56 The South Australian Police Association also took the view that superannuation orders were draconian and not suitable for a disciplinary system.<sup>576</sup> It stated that superannuation orders penalised the family of an officer and resulted in greater reliance on the welfare system and an increasing burden for the taxpayer.

12.57 The Attorney-General's Department opposed the Commission's suggestion that the sanction should be extended to all public servants.<sup>577</sup> It argued that cancellation of superannuation benefits should only flow from a conviction for a corruption offence and be effected by order of the Court. According to the Department, cancellation by a quasi-judicial or administrative body or particularly at the discretion of the Chief Executive or Departmental Agency Head would seriously undermine the integrity of the sanction. The Department held the view that the triggers for loss of employer funded superannuation should be consistent between the AFP and the CSB Acts.

12.58 In relation to the Commission's proposal for s 26F the Department questioned whether this third mechanism was needed. It stated that if the misconduct was so serious that confiscation of superannuation

was warranted there were already two existing mechanisms. The Department stated that the first of these processes (section 47) was judicial and independent while the second (section 49) provided a statutory process which operated on objective criteria which were clearly articulated. The Department indicated that it was opposed to any shortcut procedure for cancellation of superannuation benefits.<sup>578</sup>

12.59 The AFP indicated that employer superannuation contributions should not be withheld for discipline matters.<sup>579</sup> It was of the opinion that the existing s 26E, s 26F and Part VA provisions combined with the Commissioner's mandatory dismissal powers under the AFP Discipline Regulations gave the Commissioner sufficient discretionary powers to deal appropriately with breaches of discipline.

#### ***Arguments against the availability of superannuation orders***

12.60 A number of commentators have opposed the availability of superannuation orders under the CSB and the AFP Act. They argue that the basis for confiscation legislation rests on the notion of unjust enrichment, that is preventing offenders from enjoying the proceeds of their crimes and to restoring the status quo. However the superannuation orders under the CSB and AFP Acts lack this basis because they are not specifically directed towards depriving the offender of the fruits of their crime. Superannuation orders under these Acts have a disproportionate impact because the order is calculated solely by having regard to the employer contributions and the interest earned on them and thus bears no relation to the gravity of the offence committed.<sup>580</sup>

12.61 Both the AFP and the CSB legislation were not intended to be punitive or act as retribution but were intended by Parliament to act as a disincentive.<sup>581</sup> However a perceived problem is that superannuation orders are not linked to the sentencing process. The CSB legislation directs a court when sentencing a person that it shall not take into account the possibility that a superannuation order may be made in relation to the person. Some commentators have argued that merely labelling a superannuation order as a disincentive or a deterrent does not change the fact that it is a severe financial sanction with a punitive impact.<sup>582</sup> They also point out that there is no evidence that the risk of both a financial sanction and a sentence is any more likely to deter potential offenders. They argue that if the confiscation function is to be carried out it should be through the operation of the existing proceeds of crime legislation and not through this additional mechanism of superannuation orders.<sup>583</sup>

12.62 Unlike the AFP or CSB Acts the relevant Queensland legislation allows the court to make an order for an amount that is considered to be just and equitable having taken the relevant circumstances into account including

- the proportion of time the offender committed the offence over compared with his total length of service in public office
- the nature of the offence or offences and the degree of corruption evidenced by those offences
- the value of the gain to any person from that offence or offences
- the degree of hardship likely to be occasioned by the making of an order to the person's spouse or dependent (provided they can satisfy the court that they were not aware of the conduct that resulted in the order being made).<sup>584</sup>

12.63 The Queensland legislation also allows the court to have regard to the making of the superannuation order when determining the appropriate sentence for the criminal offence committed.

12.64 Superannuation orders are also said to be unfair in that they draw an inequitable distinction between public sector and private sector employment.<sup>585</sup> It is suggested that the relevant provisions of the *Crimes (Superannuation Benefits) Act 1989* (Cth) and *Australian Federal Police Act 1979* (Cth) are based on the false assumption that the employer contribution to superannuation is of special character when the employer is the government and indirectly therefore the taxpayer. It is argued that there is in fact nothing special about government employer contributions. In the case of both public and private sector employees, the employer contributions can be seen as deferred salary with the trade off being reduced wage demands.<sup>586</sup> Moreover,

taxpayers support superannuation of both private and public sector workers through the tax concessions available. Commentators also point to the important role that superannuation is seen as playing in Australia's retirement incomes systems by reducing the demand for the aged pension.<sup>587</sup>

12.65 Taxpayers are deemed to benefit from their support of superannuation by the long term reduction of demand for the payment of the age pension. The loss of these contributions through special legislation such as the AFP Act will often mean that a person will be forced to rely on the publicly funded pension. This is described as a classic case of 'double dipping'.<sup>588</sup> It is also argued that superannuation orders operate inequitably on dependents particularly partners and children, and that if partners, in particular are not to be disadvantaged in old age, 'superannuation orders should only apply to that part of the entitlement attributable directly to the fund member'.<sup>589</sup>

12.66 These criticisms of superannuation orders have related to those cases where the legislative basis for the order is conviction of a corruption offence on the criminal standard of proof. The above criticisms of these orders become more persuasive when there has been no finding of guilt on the basis of the criminal standard of proof as is the case under s 49 of the AFP Act.

### ***Commission's views***

12.67 The Commission agrees with the view put forward by the Attorney-General's Department that there should be no cancellation of superannuation under s 26F and that the AFP Act should be brought into line with the CSB Act. The Commission has taken this view because the sanction of a superannuation order for disciplinary offences does not fit within its model of managerial responsibility. Disciplinary offences are designed to protect the public and maintain proper standards of conduct within the AFP. The addition of a sanction which is currently only applied to other public servants where they are convicted of an offence and sentenced to more than 12 months imprisonment goes beyond what is required to effect the protection of the public and the maintenance of proper standards.

12.68 The continued presence of the sanction also places members of the AFP in a situation that no other Australian law enforcement personnel are placed in. The AFP itself has submitted that employer superannuation contributions should not be withheld for disciplinary matters alone.<sup>590</sup>

### **Recommendation 80 - Superannuation orders should not be available**

Superannuation orders should not be available as a sanction for a misconduct proceeding or under s 26F of the AFP Act for serious misconduct. Consequently s 49 of the AFP Act should be repealed.

### ***Should there be a power of expungement?***

12.69 There is an issue as to whether misconduct proceedings should be expunged from an officer's records and files after some period of time or where the officer has acted in a way that calls for expungement. Currently there is no expungement provision.

### ***Submissions***

12.70 Most submissions that commented on this issue took the view that expungement provisions should not apply in relation to complaints.<sup>591</sup> Most based this on the fact that it was necessary to observe trends in relation to complaints generally and in relation to individual police officers. Four submissions favoured expungement.<sup>592</sup>

### ***Commission's views***

12.71 The Commission does not support the introduction of an expungement provision. Misconduct proceedings are essentially about employee standards and suitability. They are clearly relevant to an employment history and profile and should be recorded for the purpose of promotion, security clearances

and reappointment. The relevance and weight of any matter should be determined by management in the particular circumstances. A rule as to expungement would limit the capacity for flexibility.

### **Recommendation 81 - Expungement**

There should be no statutory provision for the expungement of misconduct proceedings.

## **Providing information**

12.72 The Commission considers that regular and informative reporting to the complainant is a vital part of an effective and credible complaints system. There are two main areas to consider - reporting about investigations and reporting about the outcomes of misconduct proceedings.

### ***Reporting to complainants about investigations***

12.73 A responsive and comprehensive system for reporting about the progress and outcomes of investigations of complaints is likely to increase public confidence in the integrity of the complaints system. It may also require additional resources from those agencies providing the service.

12.74 Complainants are entitled to routine communication about the status of their complaint subject to the exceptional demands of operational security that may be relevant, particularly in cases alleging corruption.

12.75 The current reporting requirements under the Complaints Act are not elaborate. The Ombudsman upon receipt of the investigation report is to provide a complainant with particulars of the investigation<sup>593</sup> and the Ombudsman may at any time also give a complainant a progress report about the complaint.<sup>594</sup>

12.76 Reports should contain sufficient information for a complainant to understand and follow the course of the investigation and decision-making process. Where a complaint is not investigated or substantiated the reasons for this should be provided to the complainant. That might involve for example, an explanation of the standard of proof that applies.

12.77 The Ombudsman's current practice is to have one officer who takes responsibility for keeping a complainant advised of developments in the case. The NIIC, the AFP and the NCA should designate a contact officer for a complainant in respect of each individual complaint. That person would be responsible for periodically reporting to the complainant about the progress of the investigation, the reasons for any significant delay and for answering any direct inquiries from the complainant. One possibility is an obligation of reporting at least monthly. This could be done where appropriate by telephone.

### ***Submissions***

12.78 The Victoria Police stated that the functions proposed in the draft recommendation were already part of a Victorian investigating officer's responsibilities.<sup>595</sup> Written progress reports were forwarded to complainants after three months but regular telephone or personal contact between the investigator and complainant before and after this written report was encouraged.

### ***Reporting to the officer involved in the complaint***

12.79 One of the most common complaints made during consultations with AFP members was of the stress and uncertainty that occurred during the investigation of a complaint. Members stated that they had little knowledge of what stage of the process the complaint against them was at and that this placed great stress not only on them but on their families. The Commission considers that AFP members are entitled to have information about the progress of the complaint against them provided to them, subject to any necessary protection of the privacy and confidentiality of the complainant and any measures to protect operational security.

## **Recommendation 82 - Reporting to complainants about investigations**

Complainants and officers the subject of a complaint should be given regular reports on the progress of any investigation. This should be subject to, particularly in the case of reporting to the officer, any necessary protection of the privacy and confidentiality of the complainant and any measures necessary to protect operational security.

Reports should contain sufficient information for a complainant to understand and follow the course of the investigation and decision-making process. Where a complaint is not investigated or substantiated the reasons for this should be provided to the complainant. That might involve for example, an explanation of the standard of proof that applies.

## **Recommendation 83 - Contact officers**

The NIIC, the AFP and the NCA should designate a contact officer for a complainant in respect of each individual complaint. That person would be responsible for periodically reporting to the complainant about the progress of the investigation, the reasons for any significant delay and for answering any direct inquiries from the complainant. One possibility is an obligation of reporting at least monthly. This could be done where appropriate by telephone.

### ***Reporting on misconduct proceedings***

12.80 The DRP proposed that the AFP or the NCA should have the primary role in determining misconduct actions. As part of that responsibility they should inform the complainant of the misconduct process and the outcome. This should include information about the facts established, the standard of proof, any penalty imposed and the reasons for it.

12.81 The Commission proposed that the AFP and the NCA should be required under their legislation to report to the complainant on the outcome of misconduct actions including the outcome of any review by the AAT or appeal to the Federal Court. They should also be required to do so within a time to be specified in the regulations or under guidelines. Twenty eight days from the finding on a misconduct action or from a decision by the AAT or the Federal Court might be an appropriate time frame.

### ***Submissions***

12.82 The AAT has submitted that there should be an obligation on the AFP and NCA to advise complainants in advance of AAT hearings which arise out of their complaint.<sup>596</sup> The Victoria Police currently provides written advice to complainants that disciplinary action has or is to be taken against a member.<sup>597</sup> Although agreeing with the need for the disciplinary process to be transparent the Victoria Police questioned whether written notification of an outcome is the most appropriate mechanism. In Victoria advice on outcomes of disciplinary proceedings or criminal proceedings is provided to complainants either by telephone or in person.

### ***Commission's view***

12.83 The Commission agrees with the AAT's suggestion about advance notification of hearings and accepts the comments of the Victoria Police. Wherever possible information about the outcomes of misconduct proceedings or criminal actions should be provided to the complainant either in person or verbally. The officer the subject of the complaint or action should also receive similar notification (where necessary, for example, where the NIIC seeks review of the Commissioner's decision on the grounds it is inadequate).

### **Recommendation 84 - Reporting on misconduct proceedings**

The AFP and NCA should advise complainants that disciplinary or criminal action has been or is to be taken against a member arising out of that complainant's matter. Complainants should also be informed of the outcomes of those proceedings or actions and wherever possible this should be done in person or verbally.

Officers the subject of the complaint should also receive similar notification.

#### ***Information about disciplinary results***

12.84 The DRP proposed that the AFP and the NCA should consider providing greater dissemination of information about the results of proceedings involving significant misconduct throughout their respective organisations, subject to appropriate protection of the identity of complainants. This could be done in gazettes, in-house information bulletins and notice boards.

12.85 If a proceeding has been held in camera then dissemination of specific decisions even in an anonymous format should be avoided and instead information should be communicated through guidelines.<sup>598</sup> However, the Commission considered that as a general rule, those officers found guilty of significant misconduct have forfeited their right to any anonymity. For less serious cases anonymity and the use of guidelines might be appropriate.

#### ***Submissions***

12.86 The Victoria Police supported this recommendation and stated that the Victoria Police currently published these results every three months in the Victoria Police Gazette and in the Internal Investigations Department quarterly and annual statistical report.<sup>599</sup> The Victoria Police argued that this publication served to prevent rumours from arising and also helped to prevent repetition and promoted rejection of the behaviour concerned.

### **Recommendation 85**

The AFP and the NCA should disseminate widely information about the results of proceedings throughout their respective organisations subject to appropriate protection of the identity of complainants. For example, this could be done by using gazettes, in-house information bulletins and notice boards.

## **Legislative structure of the disciplinary systems**

12.87 The current AFP disciplinary proceedings are provided for by the Australian Federal Police (Discipline) Regulations made under the AFP Act. The Commission has considered whether the new misconduct regulations should be made pursuant to the NIIC Act but has reached the view that because misconduct is not always linked to complaints the misconduct regulations should remain under the AFP Act. This also acknowledges the role of the new misconduct proceedings as a managerial tool for the law enforcement agency. For the same reasons the misconduct provisions for the NCA should be included under the NCA Act.

### **Recommendation 86 - Legislative structure**

The AFP misconduct regulations should remain under the AFP Act.

### **Recommendation 87**

The misconduct provisions to be drafted for the NCA should be provided for under the NCA Act.

# 13. Anti-fraud and anti-corruption plans and measures

## Introduction

13.1 This chapter discusses

- anti-fraud plans and anti-corruption plans for the AFP and the NCA
- specific anti-corruption measures
- training and education
- articulating rights and responsibilities in relation to complaints
- the potential for a national or regional strategy and approach to fraud and corruption in law enforcement agencies.

13.2 The chapter examines the role that the National Integrity and Investigations Commission (NIIC) would play in these anti-fraud and anti-corruption strategies. The NIIC is the Commission's preferred external agency for both the AFP and NCA complaints and anti-corruption systems.

## Need for planning

13.3 Effective complaints and disciplinary systems are essential to the accountability and credibility of the AFP and the NCA. However, they do not constitute a complete response to the requirements of accountability and credibility. They must be complemented by effective anti-fraud plans and anti-corruption plans that are properly implemented and monitored. The NSW ICAC has submitted that corruption prevention can be achieved through pro-active work, formulating a strategic intelligence plan to combat corruption and targeting specific areas. Since corruption is frequently a product of the culture of an organisation, a change in culture is necessary and can be achieved through education and training.<sup>600</sup>

### *DRP proposal*

13.4 The DRP stated that it was essential that the AFP and the NCA each had its own comprehensive anti-fraud plans and anti-corruption plans and that these plans were co-ordinated where necessary. The Commission proposed that those plans must accurately analyse risk in all aspects of the organisations. The plans must be comprehensive in their scope. Furthermore, the anti-corruption plans should provide for a thorough system of integrity testing for all recruits and regular integrity testing for all staff. The Commission proposed that testing at least every three years for all staff should be a minimum requirement.

### *Submissions*

13.5 The AFP stated that it closely monitors its information security regime and is involved in continuous vetting of personnel.<sup>601</sup> Security checking generally occurs every five years especially for personnel working in high risk areas.

13.6 The AFP questioned whether the DRP's reference to 'integrity testing' included entrapment or field testing (ie fake crime scenarios or offering of bribes). It stated that although it supported proactive and where appropriate covert strategies, it was uncertain about the wider value of these methods and would wish to have further information about them before supporting their application to the AFP. It also indicated that security testing was both resource and funding intensive and suggested that testing every five years was appropriate particularly where members were not involved in high risk activities.

13.7 The AFP advised that its new security plan is likely to be ratified soon by its National Management Team. This plan is based on the principles of integrity, accountability, fairness and trust and emphasises personal integrity and ethical behaviour. The 1996 AFP Enterprise Bargain Agreement provides for testing for illicit drug and financial auditing to be taken into account when assessing employment suitability and the

implementation of these measures is currently being planned. The AFP has also developed a policy on the use by AFP members of pharmaceutical substances and is in the final stages of developing a Professional Reporting Policy to encourage AFP personnel to report malpractice and misconduct.<sup>602</sup>

13.8 The Victoria Police also supported the need for anti-fraud and anti-corruption planning.<sup>603</sup> They indicated that if the Commission's reference to integrity testing was a reference to the integrity testing programs operating in New York and also in New South Wales it was partially supported. They stated that the methods employed in those two jurisdictions were likely to require not only extensive human and financial resources but also a great deal of expertise to manage such a program. At present Victoria focuses on targeted integrity testing where particular individuals or locations are targeted on the basis of information gathered. The Victoria Police indicated that there was force wide support for targeted testing but that random or force wide integrity testing was regarded as causing significant detriment to morale.

### ***The Commission's view***

13.9 The DRP used the term 'integrity testing' as a general term to cover all of the possible forms that such testing might take. It was not intended to indicate any particular structure or form of testing. The Commission's view is that the AFP and NCA in consultation with the NIIC should develop a program for integrity testing, including whether it is to be targeted or force wide, what form it will take and how frequently it should be carried out. In developing these programs there should be consultation with the Privacy Commissioner, the Federal Disability Commissioner and other relevant bodies to ensure that any integrity tests comply with federal legislation. Due regard must also be paid to the law relating to entrapment.

### **Recommendation 88 - Integrity testing**

The AFP and NCA in consultation with the NIIC should each develop a program for integrity testing, including whether it is to be targeted or force wide, what form it will take and how frequently it should be carried out. In developing these programs there should be consultation with the Federal Privacy Commissioner, the Federal Disability Commissioner and other relevant bodies to ensure that any integrity tests are consistent with Federal legislation. Due regard must also be paid to the law relating to entrapment.

### ***Anti-fraud plans***

13.10 The federal Government in 1987 released a report that reviewed systems for dealing with fraud on the Commonwealth. That report highlighted the need for each Commonwealth agency to have a plan for fraud control.

What is required is recognition that fraud can and does occur, and an explicit, systematic approach to its prevention and detection appropriate to the requirements of the agency in question.<sup>604</sup>

13.11 This approach at a minimum requires

- identification of risk areas
- analysis of options for reducing the risks
- formulating and introducing means of prevention, detection and deterrence
- staff training
- exchange of information with other agencies
- statistical records sufficient to ensure some measurement of the effectiveness of action against fraud.<sup>605</sup>

13.12 The Commission sought advice from the AFP and the NCA about their anti-fraud plans. It also contacted the Commonwealth Law Enforcement Board (CLEB) which has the role of assessing compliance with the fraud control policy of the Commonwealth. CLEB has advised that both the AFP and the NCA submitted fraud control plans which complied with the requirements in place before December 1994. At that time a revised Commonwealth fraud policy was established. Both agencies, like many other Commonwealth agencies, are in the process of revising their risk assessment and fraud control plans to meet the additional requirements. The AFP has advised that it intends that its new fraud control plan will be submitted to CLEB in December 1996 or January 1997. The NCA finalised its updated fraud control plan in July 1996 and has submitted it to CLEB.

13.13 The Attorney-General, Mr Daryl Williams AM QC MP, has requested that CLEB review the Commonwealth's current fraud control arrangements in the light of the Government's election commitments and report to him on ways by which fraud control at the Commonwealth level can be strengthened. In response to this request CLEB has prepared a discussion paper canvassing all aspects of Commonwealth fraud control.

### ***Anti-corruption plans***

13.14 The AFP has advised that it is developing a Security Plan that is to be a comprehensive anti-corruption plan. Some major elements of that Plan are

- a professional reporting policy that will encourage reporting of unacceptable practices and protect and mentor whistleblowers
- an integrity audit regime that involves all personnel being required to declare private interests and to submit to testing for illicit drugs in the workplace
- senior management to provide statements of integrity

13.15 The NCA has advised the Commission that it currently has no formalised anti-corruption plan but it has a number of measures in place to mitigate against corruption in the NCA. Those measures are discussed below. The Commission considers that the NCA should develop an anti-corruption plan that includes a risk assessment for corruption and regular integrity testing of all staff.

### **Recommendation 89 - Need for NCA anti-corruption plan**

The NCA should develop an anti-corruption plan that includes a risk assessment for corruption and appropriate integrity testing of all staff. The NIIC should be involved in developing and monitoring AFP and NCA anti-corruption plans.

## **Anti-corruption measures**

### ***AFP anti-corruption measures***

13.16 As well as the security and anti-corruption plan mentioned above the AFP also advised that it has other extensive anti-corruption measures in place including the following:

- the establishment of the Internal Investigations Division (IID) and Internal Security and Audit (ISA) with the latter having a pro-active focus against corruption
- fixed term appointments
- a unified workforce and a performance management program
- incorporated security, ethics, corruption and fraud awareness in all training programs

- non-renewal of appointments under s 26E and the new s 26F
- loss of superannuation for conviction of corruption offences and prescribed disciplinary offences
- lowering of the burden of proof in disciplinary matters from beyond reasonable doubt to the balance of probability
- recently restructuring to adopt a multi-skilled team approach with the intention that the team concept will act as a self regulator by the rotation of personnel between teams and throughout the organisation
- the AFP Security and Audit Committee established in 1990 which is designed to reduce the risk of fraud and corruption by ensuring in-depth auditing scrutiny of programs and activities
- the AFP Protective Security Manual and the AFP Information Technology Security Policy Statement which establish security clearance policies
- a network of Regional Security Officers for each AFP region.

13.17 The AFP is also introducing as part of its accountability and ethics reforms

- a new remuneration scheme to reward those who increase their capabilities and value to the AFP
- greater use of electronic audio and video recording equipment, particularly for detecting people committing crimes and for recording interactions between officers and the public at police stations and offices.

13.18 The AFP is conducting research into the utility of forensic lie detection (polygraphs) in assessing integrity.

#### *NCA anti-corruption measures*

13.19 The NCA has advised that it has the following anti-corruption measures

- the use of small multi-disciplinary teams
- rigorous external reporting requirements to the PJC, the IGC, the Standing Committee on Organised Crime and Criminal Intelligence (SCOCCI) and the National Co-ordination Committee
- rigorous internal reporting through weekly reports to the General Manager, Operations and the Authority from all its areas
- secondment of investigators for only a two year period
- rotation of staff within regional offices
- heavy scrutiny of the NCA's coercive powers means that there is special care taken by the NCA in its recording and control of information
- a strict 'need to know' requirement for information passing beyond investigation
- management is closer to investigation than in other law enforcement agencies because of the need to ensure NCA standards meet the expectations of the NCA's partner agencies
- a high level of internal control of exhibits and documents
- strict supervision and control of assets

- auditing of financial procedures and systems
- annual audit by the Australian National Audit Office.

13.20 The NCA has a Security Branch whose main function is to develop, implement and monitor protective security within the NCA so as to ensure the integrity of its staff and assets. It carries out security checks on staff and potential members of staff. There is also an internal auditor who examines whether procedures are being followed. The NCA has an Audit Committee which meets twice a year to review internal audit matters.

### ***Human resource policies to reduce corruption***

13.21 It has been suggested that because it is almost impossible to remove the opportunities for police to become involved in corruption it is essential to attempt to prevent corruption through human resource policies.<sup>606</sup> American research suggests that women and graduates from higher education may be less likely to be drawn into the occupational culture which allows corruption to flourish<sup>607</sup> although Australian research suggests that women are just as influenced by police culture as men and that their ethical standards like men's decline after time on the job.<sup>608</sup> Other factors which might be useful in the fight against corruption include extensive training in ethics and communication<sup>609</sup> and a management structure that stresses ethical methods and a focus on crime prevention rather than law enforcement and prosecution.<sup>610</sup>

### ***Role of the NIIC***

13.22 The DRP proposed that the NIIC would be a key agency in providing external review and assistance to the AFP and the NCA in relation to anti-corruption strategies and measures. The Commission proposed that the NIIC should regularly consult with the AFP and the NCA about their anti-fraud plans and anti-corruption plans. The NIIC would be empowered to conduct random audits of all aspects of the process and to make recommendations about these systems. The NIIC would include in their annual reports to Parliament information about the AFP and NCA strategies and would report on the results of its auditing. The AFP and the NCA in developing and reviewing these measures and strategies would need to develop appropriate information links with the NIIC.

### ***Submissions***

13.23 The NCA submitted that as CLEB was currently responsible for managing and overseeing federal agencies' fraud control plans any role for the NIIC would entail duplication of roles with CLEB and the Australian National Audit Office (ANAO).<sup>611</sup> It also saw duplication of roles in relation to the proposed NIIC role in auditing and reporting.

13.24 The Victoria Police stated that the development, extent and implementation of anti-fraud and anti-corruption plans is a responsibility of the relevant agency since it is the agency itself which is ultimately accountable for failures in relation to anti-fraud and anti-corruption.<sup>612</sup> It added that agencies would no doubt welcome advice, suggestion and constructive criticism from other agencies in developing these plans.

### ***Commission's views***

13.25 The Commission does not consider that the ANAO could provide the type and level of auditing necessary for the AFP and the NCA's anti-fraud and anti-corruption plans and measures. The ANAO would be unable to provide the continuous audit that would be necessary, including periodic and random auditing. Probably the ANAO could only conduct a general audit every 3 years. Moreover, assessing fraud and corruption measures requires special expertise and experience in law enforcement that the ANAO is unlikely to have.

13.26 The Commission also does not believe that CLEB could provide what is necessary for the AFP and NCA. CLEB has a central policy role in Commonwealth fraud control but no independent statutory existence and it is within the bureaucratic ambit of the NCA. It currently has no investigative role in relation to fraud control implementation and must essentially accept agencies' statements about implementation. CLEB's current functions are to:

- advise the Minister for Justice on:
  - matters affecting the law enforcement interests of the Commonwealth, including the impact on the criminal environment of major government policy changes;
  - the functions of, and priorities to be pursued by, Commonwealth law enforcement agencies;
  - the allocation of resources to Commonwealth law enforcement agencies within the portfolio
  - statutory appointments to Commonwealth law enforcement agencies and
  - national law enforcement issues in which the Commonwealth has an interest
- prepare national criminal assessments for the Minister and the Government
- provide Government with, and review annually, a list of Commonwealth law enforcement priorities for endorsement based on assessments provided by the Office of Strategic Crime Assessments
- monitor and report to the Minister on the performance of Commonwealth law enforcement agencies against the priorities endorsed by the Minister
- relate priorities and functions to resources and report to the Minister on how Commonwealth law enforcement resources have been applied to the Government's priorities
- advise Commonwealth law enforcement agencies on appropriate co-ordination arrangements to facilitate common services, exchange of information and joint operations
- authorise standards which represent best practice in the operations and technology of Commonwealth law enforcement agencies
- authorise standards for the prevention and deterrence of fraud on the Commonwealth for use by all Commonwealth agencies and
- prepare an Annual Report to Parliament.<sup>613</sup>

13.27 Given that CLEB is comprised of the Chairperson of the NCA, the Chairperson of the Australian Securities Commission, the Commissioner of the AFP, the Secretary of the Attorney-General's Department and an executive member it is also open to question how independent any scrutiny of the AFP or NCA by CLEB would be regarded by the law enforcement community and the public.

#### **Recommendation 90 - NIIC's role in anti-corruption and anti-fraud plans**

The NIIC should regularly consult with the AFP and the NCA about their anti-fraud plans and anti-corruption plans. The NIIC would be empowered to conduct random audits of all aspects of the process and to make recommendations about these systems. The NIIC would include in their annual reports to Parliament information about the AFP and NCA strategies and would report on the results of its auditing.

The AFP and the NCA in developing and reviewing these measures and strategies would need to develop appropriate information links with the NIIC.

#### **Recommendation 91 - Avoiding duplication**

The NIIC and CLEB should enter into a protocol to avoid any duplication of roles in relation to anti-fraud policies of the AFP and the NCA.

### **Training and education**

13.28 The Commission considers that training and education of AFP and NCA staff is significant in helping to reduce the causes of complaints and corruption. Given that the complaints and disciplinary systems

proposed in this paper are significantly different to the current situation, AFP and NCA staff would need to be trained for the operation of these new systems. Information and training should also be included in induction packages and courses. The DRP proposed that NIIC should provide assistance in the training requirements.

### ***Submissions***

13.29 The NCA stated that currently the NCA carries out training of seconded police in NCA specific areas only such as EEO and information technology. Training in areas common to the NCA and AFP is the responsibility of the AFP.<sup>614</sup> It stated that upon the introduction of a misconduct code or a new system for handling complaints against the NCA, the NCA would ensure that all members of its staff were trained in the procedures.

13.30 The Victoria Police submitted that training and education was essential for the success of any disciplinary system and anti-corruption program.<sup>615</sup> They suggested that anti-corruption programs and changes in disciplinary structures need continual reinforcement, not only in the training environment but in the workplace on a day to day level. The delivery of information about these programs should be provided by individuals with exposure to operational policing. The Victoria Police also suggested that it was useful to link the marketing of anti-corruption programs with general discussions on the philosophy of policing.

### ***Commission's view***

13.31 The NIIC would play a significant role in assisting the AFP and NCA to develop appropriate training in relation to integrity and accountability and the working of the new complaints systems. The Commission considers that the following might be useful principles in that process.

- Teaching and instruction about ethics and integrity should permeate training at all levels including recruitment and in-service training programs.
- Training should consider the civil rights of citizens as well as police powers.
- All staff should undergo specific training on how to handle potentially difficult situations in order to avoid the sources of complaints, particularly at the customer service level. This might include conflict resolution skills and dispute resolution. This type of training should be a requirement for all officers in routine contact with the general public.
- Training should not only be conducted by specialist internal units. If the training has that narrow focus then it fuels the perception that preventing or detecting corruption is the responsibility of the special unit. The training will often need to be interactive and involve case studies and realistic situations.

### **Recommendation 92 - Training**

The NIIC should play a significant role in assisting the AFP and NCA to develop appropriate training in relation to integrity and accountability and the working of their new complaints systems.

### **Articulating rights and responsibilities**

13.32 There is a growing interest in developing ethics and codes of conduct within all organisations including law enforcement agencies. These measures can increase integrity and accountability.

13.33 The DRP proposed that both the AFP and the NCA should have a document that was accessible to both their staff and the general public that sets out the rights and obligations of staff and the public in relation to making and resolving complaints. This could be part of a broader code of conduct or mission statement. A breach of the code or statement would not confer any legal right.

## *Submissions*

13.34 Almost all the submissions that commented on this issue agreed that there should be a charter of rights but that this should not provide the basis for a legal action if breached.<sup>616</sup> It was thought that the charter of rights was useful as a mechanism for making the importance of complaints apparent to the AFP.<sup>617</sup> The concept of a code of conduct was seen as desirable although the Ombudsman thought that the code should deal with other aspects of AFP and NCA behaviour as well.

13.35 One NCA officer supported the introduction of a common code of conduct for all NCA staff including seconded police officers.<sup>618</sup> The Victoria Police supported the recommendation in principle and stated that the focus of a similar document being developed in Victoria was not limited to the making and resolving of complaints.<sup>619</sup>

13.36 The AFP has advised that it is developing a Code of Conduct that will complement other relevant policies such as training<sup>620</sup> while the NCA has stated that an ethics statement has been drafted and circulated to staff for comment.<sup>621</sup>

## *The Commission's view*

13.37 The Commission's view is that it would be desirable for both the AFP and the NCA to have the type of document proposed in the DRP. It would improve understanding and awareness and set out general standards of conduct.

### **Recommendation 93 - Articulating rights**

The AFP and the NCA should have a document that is accessible to both their staff and to the general public that sets out the rights and obligations of staff and the public in relation to making and resolving complaints. This could be part of a broader code of conduct or a mission statement. A breach of the code or statement would not confer any legal right.

## **Potential for a national or regional strategy**

13.38 There are two possibilities to consider. The first is a national strategy for Australia and the second is a strategy that incorporates not only Australia but also other countries in the region.

### *National strategy*

13.39 The Commission considers that a national strategy to ensure the integrity and competency of Australian law enforcement officers has many attractions. It recognises and takes account of the fact that criminal activity and general law enforcement issues cross jurisdictional boundaries. This is exemplified in the role of the NCA itself where co-operation and joint operations with national, State and Territory law enforcement agencies is a primary function. It also encourages the adoption of national standards and allows greater professional support to those seeking to apply these standard in any particular jurisdiction.

13.40 This national approach could include standards for recruitment, training, policy and procedures and data systems. There have been some developments in these areas.

13.41 The Australasian Police Ministers' Council (now the Ministerial Council on the Administration of Justice) has endorsed the development of an Australasian Policing Strategy.<sup>622</sup> One of the major goals is to enhance professionalism and accountability including developing a common code of ethics, a strategy for police education and training and developing strategies for dealing with serious misconduct. One desirable innovation would be the introduction of a uniform complaint management data system which would be very useful in assisting in comparisons of different approaches to complaints including the resources involved. The NSW Government has requested the Ministerial Council on the Administration of Justice to consider the introduction of such a system.<sup>623</sup>

### ***Regional strategy***

13.42 An AFP proposal at the Conference of Commissioners of Police of Australia and the South West Pacific region in March 1996 suggested that a regional strategy beyond Australasia is also a possibility. The Conference resolved to

- produce a clear, understandable and viable definition of corruption
- support the proposal to define a set of anti-corruption measures for consideration by all agencies in the region
- require the Police Commissioners' Policy Advisory Group (PCPAG) to advance this proposal out of session and to report to the next conference
- direct the PCAG to pay particular attention to the recommendations of the NSW Royal Commission into the Police and the Fifth Australasian Internal Investigations Seminar
- request the PCAG to examine and report to the Conference on the resource and operation efficiency implications of each of the measures that it recommends.<sup>624</sup>

### ***Submissions***

13.43 The Victoria Police said that as criminal activity including police corruption was not limited by jurisdictional boundaries an extensive regional approach was clearly desirable.<sup>625</sup> However, they were uncertain about how effective anything beyond a national approach would be.

13.44 The Hong Kong Independent Commission Against Corruption stated that should a decision be made to pursue a regional approach to anti-corruption issues it would be interested in offering comments on the proposal with a view to possible further participation.<sup>626</sup>

#### **Recommendation 94 - Developing a national strategy**

The Commission endorses the measures taken so far, such as the Australasian Policing Strategy, to develop a national strategy to ensure the integrity and competency of Australian law enforcement agencies. The national strategy should include standards for recruitment, training, policy and procedures and data systems.

#### **Recommendation 95 - Developing a regional strategy**

The Commission endorses the AFP proposal for a regional strategy against law enforcement corruption and recommends that this strategy be further developed.

# 14. Scope of complaints systems

## Introduction

14.1 This chapter considers the scope of complaints systems for the AFP and the NCA. The main issues are

- how should 'complaint' be defined
- who should be able to complain
- who may be subject to a complaint
- should anonymous complaints be accepted
- what options should be available to describe complaints outcomes
- should there be an offence of making a deliberately false complaint
- how to protect and encourage whistleblowers.

## Definition of complaint

14.2 Currently there is no definition of complaint under the Complaints Act. The only statutory guidance in the Complaints Act is that a complaint must relate to 'action taken by an AFP appointee'.<sup>627</sup> That expression is defined as:

action that the appointee takes or purports to take:

(a) because of his or her being an AFP appointee; or

(b) in the exercise of powers, or the performance of functions, given to him or her as an AFP appointee by this Act or by another law.<sup>628</sup>

The Disciplinary Tribunal has suggested that a 'complaint' under the Complaints Act is:

- any communication concerning the conduct of an AFP appointee from which it may be inferred that the person seriously disapproves of the action identified, and
- the person intends that this disapproval be made known to that member.<sup>629</sup>

The NCA Act provides no statutory framework for complaints.

## *DRP proposals*

14.3 In the DRP the Commission decided that in light of its proposal to remove the distinction between complaints and allegations a definition of complaint was required. The Commission proposed that 'complaint' should be defined to include all situations where a person expressly or by implication seeks review of, or challenges, the validity or appropriateness of the conduct of an AFP appointee or of the AFP as an organisation. This definition would remove the current distinction between complaints and allegations and was considered sufficiently broad so as to encourage people to come forward with their grievances. The Commission was of the opinion that a broad definition would ensure that the NIIC and others do not unnecessarily restrict the ambit of what can be raised.

14.4 The DRP also considered the question of interagency communications and gave the example of a communication between the DPP and the AFP about an AFP member's failure to appear at a court hearing. Because it is a statement about the inaction of an AFP officer it would be regarded as falling within the current definition of complaint despite the unsuitability of dealing with the matter in this way. The DRP proposed that the NIIC should have a power under the guidelines it develops to declare that interagency communications are not complaints unless a party involved requests the communication to be dealt with in that way.

## *Submissions and consultations*

14.5 The NCA expressed concern about the definition of 'complaint'.<sup>630</sup> The NCA's view was that the proposed definition would inappropriately extend the jurisdiction of the NIIC because it would encompass any action for review or legal challenge to actions or decisions of the NCA or its staff in the performance of their statutory functions. The NCA argued that legal challenges under the NCA Act or applications for judicial review should be excluded from the complaints system.

14.6 The Commission's response is that the Complaints Act enables AFP policies and procedures to be the subject of a complaint<sup>631</sup> and that such a definition is necessary for the effective operation of any complaints process. Complaints will often concern allegations about the misuse of power and authority by NCA or AFP officers. A power to review those actions is fundamental to any complaints system involving instrumentalities with coercive powers. To exclude complainants from the jurisdiction of the complaints authority solely on the ground that they have chosen to challenge the NCA or a member of it in the courts, either under the NCA Act, by judicial review or otherwise, would severely restrict the NIIC's ability to investigate complaints dealing with policy and practice in circumstances where there may well be a need to do so. An important example is where an individual complaint raises the possibility of an institutional defect.

14.7 There may be circumstances where a complainant could proceed with remedies in addition to, or subsequent to, the making of a complaint. Other remedies include petitioning Parliament or asking a politician to raise the complaint, seeking an unofficial or official inquiry, claiming compensation for injuries allegedly sustained by the criminal activity of police or other staff (eg under victims' compensation schemes) or seeking a civil law remedy by taking legal action. The latter includes: assault, false imprisonment, malicious prosecution, negligence, trespass, seizure of goods and damage to goods.<sup>632</sup> Complainants alleging discrimination may also seek redress under federal anti-discrimination legislation. In some cases, however, complainants may choose not to proceed with civil action due to excessive costs or delays or the difficulties of proof.

14.8 Under the Complaints Act the Ombudsman has the discretion to determine that a complaint should not proceed if the complainant has exercised his or her legal rights and caused the complaint to be reviewed by a court or tribunal.<sup>633</sup> The Commission proposes that the NIIC should have a similar discretion. This should be sufficient to meet the concerns of the NCA.

14.9 The AFP's submission also expressed concern with the width of the proposed definition.<sup>634</sup> The AFP argued that the definition was likely to apply to situations where persons are merely expressing their views without any intention of making a complaint. The AFP gave the following examples where, in its view, the definition of complaint would be too wide:

- (a) a person charged with an offence challenges the arresting member's action in court by way of defence
- (b) demonstrators make general claims of police brutality
- (c) persons who are severely intoxicated or mentally dysfunctional make wild and exaggerated claims and
- (d) reports in the media.

The Commission does not share the AFP's concerns. Each of the above examples would be regarded as complaints in the general sense of that word. However, they would only become 'complaints' under the proposed legislation if they were brought to the attention of the NIIC, the AFP or the NCA. The Commission believes that it is imperative that potential complainants are not dissuaded from making their complaints by technical or legalistic definitions of complaint. In addition, there are a number of appropriate filtering mechanisms, including the discretions of the NIIC not to investigate matters, which will ensure that resources are focused on those matters properly deserving of attention or investigation.

14.10 To take each of the AFP's examples in turn:

- (a) In this example, the NIIC would have the power to declare that a person's challenge to the action of AFP members in court is not a complaint unless one of the agencies concerned requests that it be dealt

with under the Act. In any event, the NIIC's proposed discretions would allow the NIIC to either choose to investigate the matter or not.

- (b) Similarly, the NIIC would be able to exercise its discretion to enable general claims of police brutality by demonstrators to be investigated if the NIIC decided that this was the appropriate action. To limit the definition to exclude such claims would be to limit the important public interest component of the NIIC's functions.
- (c) A narrower, legalistic definition of complaint is unlikely to prevent wild and exaggerated claims by people who are severely intoxicated or mentally dysfunctional. The discretion provisions relating to frivolous or false complaints could be applicable in these circumstances.
- (d) Reports in the media may in some circumstances constitute a complaint. If after exercising its discretion the NIIC decided that a media report may have some substance that requires investigation, it is appropriate that the NIIC should be able to investigate the allegations within the report, particularly if they are of public interest.

The Commonwealth Attorney-General's submission to the DRP stated that the functions and duties of an AFP appointee are so diverse that a definition of 'complaint' is necessary.<sup>635</sup> The Department agreed that the definition should be cast in general terms and not be too prescriptive. The definition offered in the DRP met those requirements. The Victoria Police also supported the definition proposed by the Commission.

14.11 The Victoria Police was concerned that the power of the NIIC to declare that certain matters were not complaints was to be legislative in character.<sup>636</sup> It argued that reliance on legislation to determine what is or is not a 'complaint' would lead to unnecessary complications. Further, it asserted that if an inter-agency communication is clearly expressed to be a complaint, it ought to be treated as such.

14.12 The Commission's response to this concern is that the NIIC's power to declare that interagency communications are not complaints would not be provided for in the legislation. It would be included in the guidelines determining how the NIIC should deal with a potential complaint. An interagency communication which is expressed to be a complaint would satisfy the definition of 'complaint' because in this situation at least one of the parties involved in the complaint wants it to be treated as such.

#### **Recommendation 96 - Definition of 'complaint'**

A 'complaint' should be defined to include all situations where a person expressly or by implication seeks review of, or challenges, the validity or appropriateness of the conduct of an AFP appointee or of the AFP as an organisation.

#### **Recommendation 97 - Interagency communications**

Under its guidelines the NIIC should be able to declare that interagency communications are not complaints unless one of the agencies requests that the communication be dealt with as a complaint under the Act. The same discretion should apply to matters raised in court or tribunal proceedings.

#### **Recommendation 98 - Definition of complaint for NCA**

A similar definition of complaint should be adopted for the purposes of the NCA.

### **Removal of the distinction between 'allegations' and 'complaints'**

#### ***Current distinction***

14.13 Currently there is a distinction between 'complaints' and 'allegations'. 'Allegations' are determined according to the procedures set out in AFP General Order 6 and are defined to mean 'a report' made by an

AFP member or by the public 'concerning the behaviour of an appointee not being a matter to which the Complaints Act applies'.<sup>637</sup> Matters to which the Complaints Act does not apply are:

- internal complaints made to an AFP appointee<sup>638</sup>
- 'off duty' conduct<sup>639</sup> and
- disputes relating specifically to the employment of an AFP member.<sup>640</sup>

14.14 'Off duty' conduct is behaviour that is unconnected to the exercise, or purported exercise, of police powers or the performance, or purported performance, of police functions. The distinction between off duty conduct and conduct where a member purports to act as a police officer is often complex. Some submissions suggested that because police officers enjoy a privileged position of trust and exercise extensive powers as well as having a public duty to uphold and enforce the law, police must aspire to exemplary standards in order to maintain community confidence. Even off duty behaviour can reflect on the police force. For example, an officer who regularly gets drunk while off duty in hotels might be seen as bringing discredit on the reputation of the AFP. Off duty conduct may indicate a potential for corruption. For example, a police officer who uses drugs recreationally may be supplied by criminals raising the possibility of blackmail and the request for favours in response to police protection of illegal activities.

14.15 The *Australian Federal Police Amendment Act 1996* (Cth) which deals with the power of the Commissioner to terminate appointments on the basis of serious misconduct adopts the following definition of 'serious misconduct' that appears to cover off duty conduct:

- corruption, a serious abuse of power or a serious dereliction of duty or
- any other seriously reprehensible act or behaviour by a person whether acting, or purporting to act, in the course of his or her duties as a member or staff member *or not*. [italics added].

### ***DRP proposals***

14.16 The Commission was of the view that the current distinction between complaints under the Complaints Act and allegations under AFP General Order 6 is both confusing and unnecessary. The introduction of one system of complaints that covers the current category of allegations would allow the NIIC to have a complete picture of the types of complaints that are being made about the AFP and would assist in providing an overview of the AFP's performance.

14.17 The Commission was also of the view that off duty conduct should remain predominantly a matter for the AFP to deal with internally if it raises issues about a member's suitability for the profession of policing. The Commission recognised, however, that there may be some situations where the NIIC should investigate off duty conduct, particularly where there is a suggestion of serious misconduct. The Commission proposed that off duty conduct should be able to come within the definition of a complaint. However, the NIIC would have a discretion to send matters involving off duty conduct to the AFP. The NIIC would be able to require a report about how the AFP dealt with a particular matter involving off duty conduct.

14.18 The Commission argued that a relevant distinction is between complaints that relate to misconduct and complaints that relate merely to employment performance and suitability. The Commission was therefore of the view that all matters which would previously have been regarded as falling under AFP General Order 6 should now fall within the broader definition of a complaint and would fall within the review of the NIIC. However, the Commission proposed that the NIIC would have a discretion and a system of guidelines to refer matters that relate solely to internal management back to the AFP and the NCA. As stated above the Commission envisaged that these guidelines would deal with matters such as off duty conduct.

### ***Submissions and consultations***

14.19 A number of submissions including those from the AFP and the Attorney-General's Department made the point that there was merit in having oversight of internal complaints by an external body and suggested

that the determination of all allegations by the AFP should be regularly audited and reported on by the external agency.<sup>641</sup> The Commission supports this view.

### **Recommendation 99 - Removal of the distinction between 'allegations' and 'complaints'**

In the definition of 'complaint' in recommendation 96, 'Conduct' should be defined to include any action or inaction (or alleged action or inaction):

- whether or not it also involves non-AFP participants
- whether or not it occurred while the AFP appointee was officially on duty.

### **Recommendation 100**

The distinction between allegations and complaints should be abolished with matters currently defined as allegations under AFP General Order 6 to be regarded as complaints.

### **Recommendation 101 - Internal management matters**

The NIIC should have a discretion to refer matters that relate solely to internal management back to the AFP or NCA for investigation and resolution.

### **Recommendation 102**

In conjunction with the AFP and NCA the NIIC should draft a set of guidelines which deal with the matters that will be referred back to the AFP and NCA.

## **Discretion not to investigate**

14.20 The Complaints Act provides the Commonwealth Ombudsman with a number of discretions to determine that a complaint should not be investigated or should not be investigated further.<sup>642</sup> The Ombudsman can exercise the discretion not to investigate where

- she is satisfied that the complainant became aware of the action complained of more than 12 months before the complaint was made
- if in her opinion:
  - (i) the complaint is frivolous or vexatious or was not made in good faith; or
  - (ii) the complainant does not have a sufficient interest in the subject matter of the complaint
- if a person has been charged with an offence or breach of discipline or offered a caution or admonition for a breach of discipline in relation to the action complained of
- if in her opinion, the investigation or further investigation of that action is not warranted having regard to all the circumstances.

The Ombudsman also has power to determine that a complaint shall not be investigated where a complainant has sought review by a court or tribunal or has a right to have the action complained of reviewed by a court or tribunal.

### ***DRP proposals***

14.21 The Commission proposed that each of these discretions should be available to the NIIC but that the time limit should be extended to 24 months.

## *Submissions and consultations*

14.22 The Ombudsman's submission suggested that these discretions are broad enough.<sup>643</sup> In relation to the 12 month limitation the Department of Immigration and Ethnic Affairs has suggested that the limitation period should be increased so that people from non-English speaking backgrounds who have cause to complain have a sufficient opportunity to become familiar with the complaints processes of the AFP before the time period elapses.<sup>644</sup> The Department in its submission gave the example of refugees from a country where the police are part of a repressive regime. These refugees distrust the police and the independence of any complaints mechanism. A twelve month limitation period therefore would not provide an adequate opportunity for a refugee to gain trust in the Australian complaints processes and lodge a complaint. The Commission supported the extension of the time limit to a period of two years. It recognised that the NIIC would still have the more general discretions which it can apply if investigation in all the circumstances is thought not to be warranted.

14.23 The Victoria Police suggested that there should be no discretion relating to a time limit.<sup>645</sup> It commented that regardless of the age of the complaint, such a power was a discretionary power of exclusion and that the investigating agency would conduct an investigation into appropriate matter whether the substance of the complaint arose 10 days or 10 years ago. It suggested therefore that the time limit should be abolished rather than extended.

14.24 The Commission agrees that there is force in the argument put by the Victoria Police. However, the view of the Commission is that in some cases the age of the complaint is a significant issue. The Commission considers a two year time limit constitutes an appropriate balance, ensuring the substance of the complaint is properly recognised and considered in addition to the recognition that the age of the complaint may be relevant.

### **Recommendation 103 - Discretion not to investigate**

Each of the discretions contained in s 24 of the Complaints Act should be available to the NIIC although the time limit in s 24(1)(a) should be extended to two years.

## **Who may be subject to a complaint?**

14.25 Currently complaints may be made about 'action taken by an AFP appointee', whether or not the AFP appointee is identified.<sup>646</sup> 'AFP appointee' is defined as:

- (a) a member of the Australian Federal Police; or
- (b) a staff member of the Australian Federal Police; or
- (c) a special member of the Australian Federal Police.<sup>647</sup>

## ***DRP proposals***

14.26 The Commission considered that all AFP employees and staff should come within the complaints system including AFP temporary employees, secondees and consultants engaged by the AFP. Having all categories of staff covered by the legislation reflects the reality that any staff member can be the subject of a complaint. For example, complaints could cover unauthorised access to information. By ensuring that all staff are covered by the complaints system the AFP will be encouraged to take a wider view of the complaints system than merely regulating police powers.<sup>648</sup> For the purposes of the complaints legislation the definition of an AFP appointee should be amended to clearly cover consultants and secondees.

14.27 The current approach focuses on individual police employees. Although the Ombudsman can investigate a complaint which is in substance 'about the practices and procedures of the Australian Federal Police'<sup>649</sup> a complaint must still arise from the actions of an individual AFP appointee. The Commission proposed that the Act should clearly indicate that collective action by the AFP can also give rise to a complaint within the Act. This would allow a greater focus on organisational deficiencies identified in complaints.

## *NCA and scope of complaints legislation*

14.28 The range of NCA employees covered by the proposed NIIC Act is dealt with in chapter 5.

### *Submissions*

14.29 The Victoria Police noted that the Victorian Deputy Ombudsman has a discretionary power to investigate a complaint if the conduct complained about is concerned with established practices or procedures of the police and the Deputy Ombudsman considers that those practices or procedures should be reviewed.<sup>650</sup> The Victoria Police suggested that the Victorian model is more practical and workable than the Commission's proposal that the Act should clearly indicate that complaints can be about the AFP as an organisation or about collective action by the AFP. The Commission prefers its proposal. The Commission's proposal makes it explicit that policies and procedures can be the subject of a complaints. It is a vital policy objective that legislation clearly applies not only to individual complaints about AFP appointees, but also to structural and systemic deficiencies within the AFP as an organisation.

#### **Recommendation 104 - Who may be subject to a complaint?**

All employees, temporary employees, secondees and consultants of the AFP should be covered by the complaints legislation.

#### **Recommendation 105 - Collective action**

The Act should provide that a complaint can be about the AFP as an organisation or about the collective action of the AFP.

## **Who should be able to complain?**

### *Current position*

14.30 The Complaints Act does not clearly define who can make a complaint. The Act provides that the Ombudsman may determine that a complaint should not be investigated if the 'complainant does not have a sufficient interest in the subject matter of the complaint'.<sup>651</sup> The practice of the Ombudsman is to accept complaints made by individuals or organisations on behalf of the person who is directly affected by, or a witness to, the conduct that gives rise to the complaint provided there is some indication that the individual concerned has authorised the agent to make the complaint.

14.31 The Act does not define 'sufficient interest'. The term could be applied broadly to include a member of the public with personal knowledge of, or a special interest in, the circumstances giving rise to a complaint, or narrowly so as to be limited to those directly affected by the events giving rise to the complaint.<sup>652</sup>

### *Policy objectives*

14.32 A broad test of standing has the potential to increase the number of complaints and it may increase access by Aborigines and Torres Strait Islanders, youth and persons from a non-English speaking background to the complaints system if they can complain through bodies such as community legal centres. To ensure broad access to the complaints system the legislation should expressly allow for complaints by agents and different bodies on behalf of complainants.<sup>653</sup> There is no need, however, to define who these organisations or individuals could be as to do so would curtail the right of a complainant to ask any person or organisation to make the complaint on his or her behalf. The legislation should provide that groups or corporations may lodge complaints as entities.

### *DRP proposals*

14.33 The DRP proposed no change to the current requirement of standing that the person or body must have a 'sufficient interest' in the matter. The DRP also proposed that there is no need to define 'sufficient interest' more specifically.

14.34 The Commission considered that there is no need to specify that an agent must have evidence of authority to act as an agent. At present there is no requirement for proof of authority and the Ombudsman is able to deal with the matter in a common sense way. If there is uncertainty as to whether the complainant has authorised the person or organisation lodging the complaint to do so the Ombudsman contacts the individual, or asks the person lodging the complaint to provide written authorisation or requests the complainant to contact the Ombudsman. Formalising the system of authorisation is likely to lead to a more rigid and complex system which may deter complainants with low literacy skills and result in less access to the system.<sup>654</sup>

### ***Submissions***

14.35 The NCA, the Victoria Police and the Commonwealth Ombudsman agreed with these proposals.<sup>655</sup>

### ***Commission's views***

14.36 The Commission has reconsidered the issue of standing and now takes the view that the legislation should make no prescriptions about standing. The requirement of 'sufficient interest' should be removed from the legislation. One of the most important aims of a complaints system is to ensure that legitimate complaints are considered and if necessary investigated. The source of the complaint is secondary. A person who is not directly affected by the conduct or who does not witness it may be in a position to make a legitimate complaint that otherwise may not come to the attention of the complaints system. For example, those who are directly affected by conduct or who were witnesses may be reluctant to report the conduct.

14.37 The NIIC would assess the substance of any complaint. That is the fundamental task. In the Commission's view a requirement of standing for the making of complaints is unnecessarily formal and is highly unlikely to deter those who would seek to make trivial or false complaints. The NIIC would have discretions available so that it would not have to investigate or act upon trivial, misconceived or false complaints.

#### **Recommendation 106 - Who should be able to complain?**

The legislation should not require persons or organisations to have any particular standing to make a complaint. The current requirement of 'sufficient interest' should be removed.

#### **Recommendation 107 - Organisations or corporate bodies may complain**

The legislation should specify that organisations or corporate bodies may lodge a complaint in the same way as individuals.

#### **Recommendation 108**

The legislation should expressly allow complaints by organisations on behalf of individuals but the legislation should not specify any organisation.

#### **Recommendation 109 - Agency**

The legislation should not specify a requirement of proof for an agent to lodge and proceed with a complaint.

### ***Should anonymous complaints be accepted?***

14.38 ***Current position.*** A complaint to an AFP appointee can be made whether or not the identity of the complainant is known to the member who receives the complaint.<sup>656</sup> The Act is silent concerning anonymous complaints to the Ombudsman, but it appears that they are accepted subject to the Ombudsman's discretion to determine that a complaint should not be investigated if 'the investigation, or further investigation, of that action is not warranted having regard to all the circumstances'.<sup>657</sup> There are no express provisions concerning

anonymous 'allegations'. The Ombudsman's records show that the following numbers of anonymous complaints have been received.

- In 1993/94, 7 anonymous complaints were received of which 4 were investigated.
- In 1994/95, 8 anonymous complaints were received of which 1 was investigated.
- From June 1995 to February 1996, 11 anonymous complaints were received of which 3 have been, or are in the process of being, investigated.<sup>658</sup>

The proportion of anonymous complaints for the years 1993/94 and 1994/95 is therefore less than 1.3% with a much smaller proportion of those anonymous complaints being investigated.

14.39 **Issues.** Many complainants, especially police officers, fear victimisation when they make a complaint.<sup>659</sup> The opportunity to make anonymous complaints encourages complaints to be made because complainants need not fear retribution.<sup>660</sup> This promotes the legislative aim of ensuring the disclosure of instances of police deviance, particularly internal complaints which are most likely to reveal serious police misconduct.<sup>661</sup> The Ombudsman has stated that several serious complaints have been lodged anonymously by AFP appointees which upon investigation have been found to have had substance.

14.40 **DRP proposals.** The Commission considered that the very small number of anonymous complaints which are actually investigated by the Ombudsman each year suggests that anonymous complaints are not being used widely to victimise police. The Commission was of the view that anonymous complaints should continue to be able to be accepted given that they have in the past revealed serious misconduct and that they provide an avenue for complaints by police officers who may fear victimisation in particular.

14.41 The Commission considered it a primary policy objective that anonymous complaints be accepted as there is always the possibility that they may provide valuable information. The Commission also acknowledged that some anonymous complaints may be vexatious, frivolous or vindictive. In balancing these concerns the Commission proposed that normally anonymous complaints should be accepted and investigated. However, where a preliminary inquiry indicates that there is little substance to the allegations or the conduct complained of is not such that it would constitute a criminal or disciplinary offence, then the complaint should not be investigated.

14.42 No particular problems with anonymous complaints in relation to the NCA were brought to the Commission's attention. The Commission's view was that the same approach should be adopted for the NCA as proposed for the AFP.

14.43 **Submissions and consultations.** The Ombudsman's Office has said that in the case of anonymous complaints the Office will often carry out some preliminary inquiries to test whether there is any likely substance in the complaint and whether there is sufficient information to enable the complaint to be investigated. A full investigation is usually only conducted when the answer to both of these questions is in the affirmative. The Ombudsman has a discretion to decide that a complaint which lacks proper substance ought not be investigated and the figures supplied by the Ombudsman suggest this discretion is used.<sup>662</sup>

14.44 During consultations, many AFP officers expressed concern about the acceptance and investigation of anonymous complaints.<sup>663</sup> They argued that this gave people the opportunity to make malicious or false complaints without fear of punishment. One view was that if there was an anonymous complaint or any other complaint to which there was no substance there should be a formal apology, presumably by the AFP to the officer involved.<sup>664</sup> Another suggestion was that there should be a greater distinction in the formal outcomes of complaints instead of merely 'complaint unsubstantiated' to indicate those cases where an officer had been vindicated.<sup>665</sup>

14.45 The AFP's submission to the DRP argued that the Commission's proposed anonymous complaints provision was too narrow, restrictive and legalistic.<sup>666</sup> It suggested that the AFP should be able to investigate anonymous complaints, if it chooses to do so, even in the event that the NIIC has exercised its discretion not

to investigate. The AFP considered it important that the NIIC advise the AFP of the details of such complaints for intelligence purposes.

14.46 The Victoria Police agreed with the AFP's submission. It submitted that the DRP proposal was too restrictive in spelling out when the investigation of an anonymous complaint should occur.<sup>667</sup> It argued that the level and extent of any investigation should be determined on the basis of the information that is available or which might reasonably be pursued, not on the basis of some restrictive legislative provision.

14.47 *Commission's views.* The Commission is now of the view that it would be more appropriate for the Act to provide that anonymous complaints be accepted and made subject to the normal procedure for the handling of complaints. This is consistent with the approach that it is imperative not to discourage complainants by restrictive, technical or legalistic procedures or provisions. The Commission considers it appropriate that the NIIC accept all anonymous complaints according to the requirements of the legislation concerning complaints generally and according to the guidelines established by the NIIC. The Commission is also of the view that subject to operational security and the nature of the complaint, the NIIC would usually provide the details of anonymous complaints to the relevant organisation.

#### **Recommendation 110 - Should anonymous complaints be accepted?**

Anonymous complaints should continue to be accepted. There should not be any legislative prescription as to how they should be treated or in what circumstances they should be investigated.

#### **Recommendation 111 - No specific discretion necessary for anonymous complaints**

The NIIC does not require a specific discretion not to investigate anonymous complaints as the discretion to determine that an investigation is not warranted in all the circumstances is sufficient.

## **Recording complaints outcomes**

### *Current situation*

14.48 The IID and the Ombudsman have an administrative arrangement that provides for the following main outcomes after a complaint has been investigated

- substantiated
- unsubstantiated
- incapable of determination
- conciliated.<sup>668</sup>

14.49 Under this arrangement the outcome of 'substantiated' has the following options

- no further action
- supervisory action concerning member
- criminal or disciplinary action
- action concerning practices or procedures.

14.50 The Ombudsman uses the following definitions

- substantiated - satisfied that the evidence shows the AFP's actions were defective
- unsubstantiated - satisfied that the evidence does not show the AFP's actions were defective
- incapable of determination - the evidence is not conclusive either way and further investigation is unlikely to produce a different result.<sup>669</sup>

### *Submissions and consultations*

14.51 The Commission found during its consultations with AFP personnel that there was widespread dissatisfaction with the current range of outcomes. In particular, personnel were concerned that there was no outcome which indicated that there was no fault found against the officer or that a complaint was false.

### *Commission's view*

14.52 The primary task of the investigator of a complaint must be to determine whether the complaint is substantiated or not. In the Commission's view a finding of 'substantiated' should mean that the investigator is satisfied that what the complainant alleged did happen. A finding of 'unsubstantiated' should mean that the investigator is satisfied that what the complainant alleged did not happen. Complaints should only be classified as 'incapable of determination' where the investigator has expended appropriate resources and effort but cannot be sufficiently satisfied to make a positive finding of substantiated or unsubstantiated.

14.53 The Commission considers that the determination of the outcome of an investigation of a complaint should be concerned with establishing the relevant facts of the matter. The issue of whether the AFP's actions were defective or the officer has acted improperly, and for example, should be subject to criminal and/or disciplinary action, should only follow after that initial factual determination. The Commission considers that to cover the full range of options and to ensure consistency in investigative approach some changes to the current complaints outcomes are necessary.

14.54 The Commission proposes that there should be an additional classification of 'deliberately false'. This category would be used for cases where the investigator determined that the complainant has deliberately made a false complaint. This additional classification would allow the opportunity to attribute a greater degree of responsibility in the outcome for deliberately false complaints. A record should also be kept of all cases where the complainant has been convicted of the offence of making a deliberately false complaint.

14.55 The outcome 'unsubstantiated' would be appropriate where the investigator is satisfied that the complaint was false but not deliberately so; that is, the alleged conduct did not happen and the complaint was either made as a result of a misinterpretation of the facts or a misunderstanding. The statistical records should be able to differentiate between the categories of 'unsubstantiated' and 'deliberately false' but also aggregate them to show the total number of complaints that are unsubstantiated or substantiated.

14.56 The Commission also proposes that there should be an optional endorsement available in those cases that are determined to be 'substantiated'. This endorsement of 'substantiated-no fault' would be used for cases where the investigator determines that the complaint is substantiated but that the officer or officers concerned acted without fault.

14.57 The options for investigation outcomes for complaints should be provided for in the legislation and each outcome should be statutorily defined. This would assist in achieving consistency in investigative approach and outcomes.

## **Recommendation 112 - Recording of complaint outcomes**

The current complaint outcomes of 'substantiated', 'not substantiated', 'incapable of determination' and 'conciliated' should be retained but with the additions of the category of 'deliberately false' and the option of 'substantiated - no fault'.

## **Recommendation 113 - Options for investigations outcomes**

The options for investigation outcomes for complaints should be provided for in the legislation and each outcome should be statutorily defined.

## **Use of offences to achieve proper scope of complaints system**

### ***Current position***

14.58 There are two specific offences that can help to achieve an appropriate balance between punishing or deterring false complaints and encouraging legitimate ones. These are the offence of making a false complaint and the offence of victimising a complainant. The two balance each other.

### ***Deliberately false complaints***

14.59 It is an offence to make a false complaint under the Complaints Act.<sup>670</sup> However, proceedings for the offence cannot be brought without the consent in writing of the Ombudsman or, if the Ombudsman refuses to consent, the Attorney-General. The offence was introduced following a recommendation of a Working Party consisting of the AFP, the Commonwealth Ombudsman and the federal Attorney-General's Department. The Senate Standing Committee on Legal and Constitutional Affairs also agreed with the introduction of the offence.<sup>671</sup>

### ***Width of the offence***

14.60 There are different views about the necessary width of the section and the appropriate penalty. For example, the Northern Territory Act<sup>672</sup> provides for an extremely broad offence of intentionally creating a 'false impression' which would lead to the investigation of a complaint. However, the consent of the Northern Territory DPP is required before the charge may be laid. In Queensland, it is also an offence to make a frivolous or vexatious complaint to the Criminal Justice Commission,<sup>673</sup> and if the offence is proven the offender may be ordered to pay the costs of any investigation which is instituted.<sup>674</sup> In South Australia the false complaint offence includes an offence of preventing a person from making a complaint.<sup>675</sup> Any prosecution is subject to the consent of the Police Complaints Authority.

### ***DRP proposals***

14.61 The Commission considered that the offence of a false complaint should be retained in order to ensure a proper balance in the system. The Commission proposed that the offence should be amended to ensure that a court or tribunal can award the costs of any investigation into the false complaint against any person found guilty of the offence. The NIIC should monitor the way in which complainants and potential complainants are informed of the existence of the offence by police so as to ensure that existence of the offence is not used as a way of improperly deterring people from making complaints.

14.62 The Commission received no specific submissions on the application of this offence to the NCA. It was of the view that the offence should apply to false complaints concerning the NCA.

### ***Submissions and consultations***

14.63 One view is that the process for dealing with false or vexatious complaints is necessary to ensure that the complaints mechanism retains internal credibility.<sup>676</sup> The Ombudsman's view is that on balance there is probably a place for such an offence but only with at least the existing safeguards in place. The Ombudsman still had some concerns about the offence and whether it acts as a deterrent.

14.64 Many AFP officers consulted were concerned about false, vexatious or trivial complaints that could be used to harass officers or to delay criminal investigations or process.<sup>677</sup> A common suggestion was that some formal screening of these types of complaints was necessary so that only those with substance and significance were actually investigated.<sup>678</sup> Some reference was made to the AIDEX demonstrations. It was suggested that the Ombudsman had been biased against the police and had solicited complaints.<sup>679</sup>

14.65 One suggestion was that officers should be able to claim compensation for stress where they had unfounded complaints made against them.<sup>680</sup> Another view was that complainants should have to make statutory declarations about their complaints.<sup>681</sup>

### *Commission's views*

14.66 There is nothing in the current Complaints Act which precludes an AFP officer from pursuing his or her common law rights to seek redress from persons making false or malicious complaints. Officers are also entitled to seek compensation for stress related problems in common with other employees. The Commission's view is that to grant AFP appointees and NCA staff specific statutory remedies regarding such complaints is unnecessary.

### **Recommendation 114 - False complaints**

The false complaints offence should be retained but should be amended to allow a court on conviction of a person to award the costs of any investigation into the false complaint against that person.

### *Victimisation of complainants*

14.67 The AFP Complaints Working Party<sup>682</sup> recommended that there be an offence of victimisation. The Senate Standing Committee on Legal and Constitutional Affairs also recommended that an offence of victimisation be created to balance the proposed offence of false complaint.<sup>683</sup> In 1994 an offence of victimisation was inserted in the Complaints Act as follows

s 88A. A person must not cause, or threaten to cause, detriment to another person (the victim) on the ground that the victim, or any other person:

- (a) has made or might make a complaint under this Act; or
- (b) has made or might give a document or other information to a person under this Act.

Penalty: Imprisonment for 6 months.

### *DRP proposals*

14.68 The Commission considered that the offence of victimisation should be retained. The rationale for the offence is clear. Complainants need to be encouraged to come forward with grievances and to be made aware that they are protected from possible victimisation including threats of prosecution for making a false complaint or from civil action by a member against whom the complaint is made.<sup>684</sup> No submissions have been received in relation to the NCA and the availability of this offence. The Commission considered that this offence should also apply to matters arising in relation to the NCA.

### **Recommendation 115 - Victimisation of complainants**

The offence of victimisation should be retained under the NIIC Act and should also apply to complaints concerning the NCA.

### *Disclosing the substance of a complaint to another AFP member*

14.69 *Current position.* It is an offence for an AFP officer, staff member or person investigating a complaint to divulge information supplied to or acquired by the AFP during the investigation of a complaint except in the performance of his or her duties or with the consent in writing of the appropriate person. The section does not prevent a person from disclosing information in the production of a report made under the Act or in

evidence before a court or disciplinary tribunal.<sup>685</sup> It is also an offence for the Ombudsman or her staff to divulge or communicate information obtained in the course of investigation of a complaint.<sup>686</sup>

14.70 These offences are intended to protect the confidentiality of information relating to complaints and their investigation. However, there is an exception that allows the Commissioner a discretion to disclose information to any person or to the public if in the opinion of the Commissioner it is in the interests of the AFP or the public.<sup>687</sup> The AFP uses this discretion to disclose information to supervisors and managers when patterns of complaints about individual appointees are detected by the IID. This information is now also taken into account when considering dismissal or reappointment of appointees.

14.71 In response to the Issues Paper, the Ombudsman said difficulties remain over how much information should be disclosed for such purposes.<sup>688</sup> The Ombudsman was concerned that protection of the complainant's right to complain may be curtailed if complainants believe that their personal details and complaints could become widely known within the AFP. The Ombudsman said that there have also been cases where information was disclosed to operational areas of the AFP in order to investigate the individual complainant. The Ombudsman argued that this should only occur where there is overwhelming public interest in that investigation as balanced against the public interest in protecting the integrity of the complaints system.

14.72 According to the Ombudsman the information required by the AFP to supervise and manage appointees does not need to include information identifying the complainant. The Ombudsman suggested that the secrecy provisions should be redrafted to provide that information relating to appointees, including complaint investigation details, should be available for prescribed purposes within the AFP, but that personal information identifying the complainant should not be disclosed without the consent of the Ombudsman. To protect the internal confidentiality of the complaints process, secrecy provisions should also apply to information obtained by AFP appointees as a result of a complaint investigation. This would ensure that the integrity of the complaints system is protected and appointees are accountable.

14.73 **DRP proposals.** The Commission proposed that the secrecy provisions should ensure that information relating to AFP appointees does not need to include the identification of the complainant. The legislation should provide that information relating to appointees, including complaint investigation details, should be available for defined purposes within the AFP as discussed above, but that personal information identifying the complainant should not be disclosed without the consent of the NIIC.

14.74 **Submissions and consultations.** Victoria Police agreed that information identifying the complainant should not be disclosed beyond that which is necessary to investigate and to prosecute or resolve the complaint.<sup>689</sup> However, it raised the concern that there may be instances where it is essential for the safety of police members that the identity of the complainant be disclosed. Such a situation may arise where the demonstrated behaviour of a complainant is such to warrant concern as to the welfare of police. The Commission's view is that in these unusual circumstances the NIIC would provide such details.

14.75 **NCA and secrecy provisions.** The Commission is of the view that similar provisions should apply to the NCA. The current secrecy provisions applying to the NCA are discussed in chapter 5. The NCA agreed with the application of the proposed secrecy provisions.

#### **Recommendation 116 - AFP and NCA secrecy provisions**

The secrecy provisions in the Complaints Act s 87 should be redrafted to ensure that information relating to appointees does not need to include information identifying the complainant. The legislation should provide that information relating to appointees, including complaint investigation details, should be available for defined purposes within the AFP as discussed above, but that personal information identifying the complainant should not be disclosed without the consent of the NIIC.

Similar provisions should apply to the NCA.

## **Protection and encouragement of whistleblowers**

14.76 Whistleblowers are people in organisations who report corrupt, illegal, fraudulent or harmful activity by the organisation or members of it.

### ***Current situation***

14.77 There is whistleblowing legislation in some State jurisdictions.<sup>690</sup> There is currently no Commonwealth legislation.

14.78 A Senate Select Committee on Public Interest Whistleblowing issued a report in August 1994 and recommended that Commonwealth legislation should be passed establishing an independent agency to be known as the Public Interest Disclosures Agency (the Agency). The role of the Agency would be to receive public interest disclosures and arrange for an appropriate authority to investigate them. Other functions would be to ensure the protection of people making such disclosures, to provide a national education program and to develop and oversee recommendations relating to the Agency's role. The AFP advised that it recommended that whistleblowing legislation apply to it and all government departments and agencies.<sup>691</sup>

14.79 The Committee recommended that the AFP be covered by any whistleblower protection legislation. It also commented that there appeared to be a lack of successful police force reform to date in relation to protecting and encouraging whistleblowing and that additional education initiatives and strategies should be directed at whistleblower protection in State and federal police services. Other recommendations were directed at changing community attitudes towards whistleblowers and informing the public of the public benefits flowing from whistleblowing.

14.80 On 1 December 1994 a further Senate Select Committee was established to inquire into unresolved whistleblower cases. The report of this Committee was tabled in October 1995. A response by the previous government to the earlier report was tabled in Parliament on 26 October 1995. The Government stated that it would introduce whistleblowing legislation as part of its response to the Gibbs committee's recommendations<sup>692</sup> and as part of its response to the recommendations of the Samuels' Commission of Inquiry into ASIS.<sup>693</sup> However, no further action was taken on introducing whistleblowers legislation before the recent change of government.

14.81 The NSW Royal Commission into Police has highlighted the ethical dilemmas and fears that many would-be whistleblowers face. Whistleblowers must be encouraged and protected and this is especially so in relation to organisations like the AFP and the NCA where there may be cultures that victimise or intimidate whistleblowers.

### ***DRP proposals***

14.82 The Commission considered that legislation to protect and encourage whistleblowers was necessary. The Commission commented that while legislation covering all Commonwealth agencies was desirable, there was a pressing need for legislation covering the AFP and NCA.

### ***Submissions and consultations***

14.83 The Whistleblowers Association strongly supported effective federal whistleblower protection to underpin the effectiveness of any AFP and NCA complaints system.<sup>694</sup>

14.84 The Attorney-General's Department advised the Commission that the federal Government is currently considering the introduction of whistleblowing legislation to protect public officials who expose corruption in the public service. This would apply to the AFP and NCA.<sup>695</sup>

14.85 The submissions from the AFP and Victoria Police did not support the term 'whistleblowing' as it is widely regarded as being derogatory and demeaning.<sup>696</sup> The AFP considered more acceptable terms to be 'professional reporting' or 'integrity reporting'. The Victoria Police refers to people who report internal criminality as 'internal sources'.

14.86 The AFP advised that a policy is being finalised in conjunction with the Ombudsman in relation to whistleblowers. According to the AFP, the policy provides, among other things, for the Ombudsman to be notified as early as possible of reports, including advice on allegations of harassment of appointees who report under the policy. The Victoria Police advised that it has introduced a policy, supported by a range of strategies and disciplinary offences, to encourage internal reporting and to encourage and protect those people who make such reports. It has also sought legislation in support of these strategies.

14.87 The NCA's submission to the DRP commented that while the NCA has always supported, and will continue to support, whistleblower legislation, it is not aware of any information or allegations indicating that there is a pressing need for such legislation in respect to the NCA.<sup>697</sup> The view of the NCA is that the functions of the NCA are such that it may have a less pressing need for such legislation than others.

### ***Commissions views***

14.88 The NCA has a central role in the national criminal investigative process. It has access to highly confidential information. It is also has special coercive powers in certain circumstances. There is a potential for misuse of confidential information and for misconduct as there is for any other body involved in the criminal investigative process.

14.89 Many of the NCA's operations are carried out by police officers. In this respect problems associated with police culture may apply to the NCA as they do to other police services. One of the issues associated with this culture is the difficulty law enforcement agencies have in ensuring the protection of whistleblowers. To suggest that there may be less pressing need for the protection of whistleblowers in the NCA than police services is to fail to acknowledge the nature of the NCA's activities. One NCA officer in a confidential interview with the Commission commented that the NCA culture was predominantly a police culture and that there were real problems for whistleblowers who needed protection.<sup>698</sup> The Commission is unaware of any programs undertaken by the NCA to encourage whistleblowers and to ensure their protection.

14.90 The Commission acknowledges the concerns of the AFP and Victoria Police with the use of the term 'whistleblowers'. The term is used in this report because of its wide usage and familiarity. The Commission agrees, however, that any legislation in this area should avoid the term 'whistleblower' for the reasons outlined by the AFP and the Victoria Police.

14.91 Statutory whistleblower protection at the federal level has been discussed since 1991<sup>699</sup> and there is an increasing recognition of the need for protection for whistleblowers not only in relation to law enforcement but in general industry also.<sup>700</sup> The Commission considers that appropriate legislation should be enacted as a matter of priority.

### **Recommendation 117 - Protection and encouragement of whistleblowers**

The Commission supports legislation to protect and encourage whistleblowers. This should cover all Commonwealth agencies including the AFP and the NCA. The legislation should be enacted as a matter of priority.

### **Recommendation 118**

The NIIC should assist the AFP and NCA in developing and reviewing whistleblower policies and programs.

## **Other issues**

### ***Avoiding disciplinary action***

14.92 ***Retiring on ground of invalidity.*** The Issues Paper raised the question of whether officers who are likely to face disciplinary action may try to avoid it by resigning or taking retirement on the grounds of invalidity. The AFP submitted that retirement on the ground of invalidity has not been used to avoid disciplinary proceedings. Under the provisions of the AFP Act and the Commonwealth superannuation

legislation, the retirement of AFP appointees on invalidity grounds cannot be legally effected without the issue of an appropriate certificate by the Commonwealth Superannuation Board of Trustees.

14.93 The DRP did not suggest there was any need to change the current situation. There was no response to this suggesting any alternative views.

14.94 **Resignation.** Under the AFP Act the resignation provisions differ according to whether the appointee is a member or a staff member. A staff member may resign at any time by giving written notice to the Commissioner with the resignation taking effect from the date specified in the notice. For a member's resignation to be effective it must be offered three months after (or within such shorter period as the Commissioner allows) a notice is given to the Commissioner indicating the member's intention to resign.<sup>701</sup>

14.95 The AFP advised that there have been some occasions where members or staff members who have been the subject of disciplinary proceedings have resigned. Generally these resignations have been accepted with the result that the disciplinary action lapses. The AFP submitted, however, that each case is considered in the context of the surrounding circumstances and there may be occasions when accepting the resignation is in the best interests of the AFP. An example would be where the person's behaviour or conduct raises serious doubt as to his or her continued employment suitability but s 26E or non renewal of appointment is not available and there is no guarantee that a disciplinary hearing will result in a finding of dismissal. The Commissioner's power not to accept a resignation is limited by s 52 of the AFP Act.

14.96 Section 52 provides that where proceedings are started in respect of a breach of a relevant disciplinary offence and the person, either before or after those proceedings are commenced, gives notice of intention to resign or resigns or is retired to take effect on or after the commencement of proceedings, the resignation or retirement will not have any effect. In this situation the person will be regarded as being suspended without pay. The AFP has stated that it has received legal advice that proceedings under s 52 are limited to Federal Police Disciplinary Tribunal proceedings which is a further restriction on the situations where the Commissioner could refuse to accept a resignation.

14.97 The *NSW Police Integrity Commission Act 1996* (NSW) provides that conduct may be dealt with, or continue to be dealt with, under that Act even though any police officer involved has ceased to be a police officer and that references in the Act to a police officer should be read where appropriate as including a former police officer. In the Commission's view a similar provision which would allow the NIIC to investigate conduct of a former officer should be provided in the proposed NIIC legislation.

14.98 The Commission considers that in the interests of public confidence in the system the s 52 power to defer resignation and suspend an officer without pay should be extended to those situations where

- the Commissioner has initiated an action for misconduct by providing the appointee with notice in writing of the initiation of that action or
- a formal investigation into the appointee's conduct has been commenced by the NIIC or at its direction.

14.99 **Submissions.** The AFP's submission commented that the power to investigate or deal with former AFP appointees should extend to compelling former appointees to provide relevant information to the body investigating complaints coupled with the imposition of criminal sanctions for a refusal or a failure to comply with such a direction.<sup>702</sup>

14.100 The Victoria Police suggested that if members are subject to disciplinary action it is preferable that they be dismissed than allowed to resign.<sup>703</sup> The Victoria Police advised that it is seeking legislative amendments which will allow the Commissioner to refuse to accept a member's resignation for a number of reasons, including that charges are pending.

14.101 The Commonwealth Attorney-General's Department and the NCA supported the proposal but noted that if the NIIC undertakes an investigation into a former AFP appointee or NCA staff member then, unless the investigation discloses evidence of a criminal offence, the powers of the NIIC against a former employee are somewhat limited in that disciplinary action can not be taken.<sup>704</sup> Where evidence of a criminal offence is

disclosed the NIIC can pass on that information to the AFP or the Director of Public Prosecutions for appropriate action. Where the investigation indicates deficiencies in NCA or AFP procedures or practice, the NIIC would make these observations known to the relevant organisation.

### **Recommendation 119 - Avoiding disciplinary action**

The NIIC Act should include an amended equivalent to s 52 of the *Complaints (Australian Federal Police) Act*. The provision should ensure that the Commissioner's power to defer a resignation is available where the Commissioner has initiated an action for misconduct by serving the appointee with notice in writing of the initiation of that action or where a formal investigation into the appointee's conduct has been commenced by the NIIC or at its direction.

### **Recommendation 120 - Powers in relation to ex-staff**

The NIIC should have power to investigate or deal with conduct even though an AFP appointee or NCA staff member has ceased to be an AFP appointee or a NCA staff member.

#### ***Provision of an AFP member's name and address upon request***

14.102 When a person requests the name and place of duty of an AFP appointee for the purpose of making a complaint, the Complaints Act provides that it is an offence to refuse or to give false details.<sup>705</sup> The obligation only exists where the individual requests such information for the purpose of making a complaint.

14.103 The AFP has submitted that this requirement for appointees to furnish their names and addresses should be dispensed with in cases where the appointee is wearing a visible official AFP identification number. Appointees should also have a discretion not to disclose their names where there is a justification for not doing so, for example, where the member fears harassment.<sup>706</sup>

14.104 Members of the rank of constable and sergeant are required to wear identification numbers attached to the front of their uniforms at all times. However, numbers may be removed or exchanged and the obligation only applies to members at these ranks at the time they are in uniform. This means that the obligation is in fact only applicable to the AFP within the ACT as almost all members of the AFP within the national region operate in civilian clothes. The obligation does not apply when members are off duty but are purporting to act as police officers (for example, an officer who attempts to break up a brawl at a local football game in his or her capacity as a police officer as opposed to that of a concerned citizen).

14.105 ***DRP proposal.*** The Commission was of the view that the requirement should apply even where the officer is wearing an identification number. However, AFP officers should have a discretion not to provide their names or addresses where they believe on reasonable grounds that to do so would jeopardise their safety or the safety of others or jeopardise operational security. The requirement for officers to wear their identification numbers when they are in uniform should be amended to apply to all officers and the numbers should be permanently affixed to uniforms.

14.106 ***Submissions.*** The Victoria Police commented that their operating procedures require all members to immediately give their name, number and station to any person who requests such details on any reasonable occasion.<sup>707</sup> In relation to the Commission's proposal regarding the affixing of identification numbers, the Victoria Police suggested that a proper cost analysis should be undertaken before adopting this strategy.

14.107 ***Commission's view.*** The Commission's view is that the identification of police by complainants is of vital importance. The affixing of identification numbers enables potential complainants to identify with some certainty the officer whom they believe acted improperly. Not having that information may deter a potential complainant from making a complaint. A fundamental policy objective is to ensure that potential complainants are not unfairly dissuaded from complaining.

## **Recommendation 121- Provision of AFP members' name and address upon request**

Officers should be under a duty to provide their names and work addresses on request where the person requesting the information indicates that he or she wishes to make a complaint. However, AFP officers should have a discretion not to provide their names or addresses where they believe on reasonable grounds that to do so would jeopardise their safety or the safety of others or jeopardise operational security. The requirement for officers to wear numbers when they are in uniform should be extended to apply to all officers and the numbers should be permanently affixed.

### ***Medical examinations for complainants***

14.108 In the Issues Paper the Commission asked about medical treatment or medical services for detainees and others. The Ombudsman responded that although in the past she has had some concerns about AFP care for detainees she believes that the AFP has improved its procedures for ensuring detainees receive adequate medical treatment and that she is not aware of any current concerns.<sup>708</sup>

14.109 According to the AFP submission to the Issues Paper, where a person complains of being assaulted by an AFP officer and there are reasons to believe that a medical examination of that person will produce relevant evidence, the normal procedure is to request the person to submit to a medical examination by a AFP medical officer or, in cases outside the ACT, a Commonwealth Medical Officer or private medical practitioner.<sup>709</sup> AFP medical officers conducting examinations in such circumstances submit reports and these reports are, where appropriate, forwarded to the Ombudsman.

14.110 The Ombudsman has commented that private medical practitioners are often not experienced in providing a report for such purposes and may provide insufficient detail. She has stated that there would be some benefits in an arrangement whereby complainants are seen by a medical practitioner experienced in forensic medicine if the complainant agrees. The Ombudsman has suggested that where services such as the Victorian Office of Forensic Medicine are available, it would be useful to have arrangements in place to allow access. Where arrangements are not available, or where complainants prefer their own medical practitioners, an alternative may be to develop a reporting form for complainants to give to the medical practitioner to assist in providing adequate information about the examination.

14.111 The Ombudsman has also suggested that assessment of medical evidence may well require specific expertise in forensic medicine and that it would be preferable for the external agency overseeing the AFP complaints process and the AFP to have access to independent expertise in considering medical evidence. The Ombudsman has suggested exploring the provision of advice by an existing State or Territory body with sufficient independence.

### ***Submissions***

14.112 The Victorian Institute of Forensic Medicine has stated that it would be willing to assist in establishing procedures for the AFP to facilitate medical examinations for complainants.<sup>710</sup> The Institute suggested it could assist in developing medical services to assist in the investigatory process, the training of medical practitioners in this role or in the provision of expert opinions to both investigators and the courts.

14.113 The Victoria Police commented that as complainants cannot be compelled to undergo medical examination by any doctor, the alternative would be to supply the doctor with the best possible information which might assist in the determination of a complaint investigation.<sup>711</sup> It suggested that any reporting form developed should include provision for the complainant to authorise release to the investigating agency of information from the doctor for use in the investigation into the complaint and any related proceedings. The Commission agrees with this suggestion.

### **Recommendation 122 - Medical examinations**

The AFP should liaise with the Victorian Institute of Forensic Medicine and any similar specialist services to assist in establishing medical procedures for complainants including:

- services for the investigation process
- the training of medical practitioners in this role and
- the provision of expert opinions to both investigators and the courts.

These medical procedures should include developing a pro-forma report for medical practitioners asked to examine a person who has complained about assault or other mistreatment by the police or any other law enforcement officer. In the event that a complainant chooses their own doctor, the doctor should be provided with the best possible information which might assist in the determination of the complaint investigation.

### ***Vicarious liability***

14.114 *Issue.* Under the AFP Act s 64B, the Commonwealth is liable in respect of torts and acts or omissions of AFP members in the performance or purported performance of their duties. It is likely that the corrupt activities of a member would not fall within the definition of the performance or purported performance of duties so the Commonwealth would not be liable for these activities. In any case, the Commonwealth's liability does not extend to any punitive damages that may be awarded. These are borne by the member involved.<sup>712</sup> In the DRP the Commission proposed that s 64B be amended to make it clear that corrupt conduct does not fall within the definition of performance or purported performance of duties. In recognition of the fact that it is not only members who may incur liability, s 64B should be extended to include staff members as well.

### **Recommendation 123 - Vicarious liability**

The operation of s 64B should be extended to cover staff members as well as members. The section should be amended to make it clear that the corrupt activities of a member do not fall within the definition of the performance or purported performance of duties.

# 15. Processing complaints

## Introduction

15.1 This chapter examines

- receiving complaints
- recording complaints
- providing information about the complaints systems and
- information and advertising.

## Receiving complaints

### *Current situation*

15.2 The Complaints Act does not specifically prescribe who may receive a complaint. It is only when a complaint is lodged with the Ombudsman or an AFP appointee that the complaints procedure under the Act is invoked.

### *DRP proposals*

15.3 The DRP expressed the view that although complainants should be able to ask any individual or group to lodge a complaint on their behalf, it was not desirable to widen too much the range of places at which complaints can be lodged formally. This is because including the full range of individuals and organisations would be very difficult and might exclude relevant persons or groups.

15.4 The Commission proposed that complaints be regarded as formally lodged when they are lodged with an AFP appointee, an NCA staff member, the Commonwealth Ombudsman or with the NIIC. The Ombudsman should be retained as a lodgement point because of the fact that she has some presence in all States and Territories apart from Tasmania and because she has already built up some public profile in the community in relation to police complaints. On receiving complaints the Ombudsman would be obliged to forward them directly to the NIIC. The Commission also suggested that the State and Territory anti-discrimination bodies, ICAC, the CJC and the NSW PIC as well as other State and Territory external agencies for handling police complaints might be possible reception points for complaints against the AFP and the NCA. These bodies should be consulted as to whether they would be in a position to act as formal lodgement points.

### *Submissions*

15.5 The NCA, the AFP, the Victoria Police and the Ombudsman supported the Commission's proposals in relation to receiving complaints.<sup>713</sup>

### *Methods of making complaints*

15.6 A complaint may be made to the Ombudsman orally or in writing.<sup>714</sup> The Act provides that the Ombudsman may require that an oral complaint be reduced to writing at any time. Where the complainant refuses to put the complaint in writing, the Ombudsman may exercise a discretion not to investigate the complaint.<sup>715</sup> Persons in custody have the right to request the necessary facilities to make a complaint and to have a sealed envelope containing a complaint sent to the Ombudsman without any undue delay.<sup>716</sup>

15.7 The Commission is of the view that both written and oral complaints should be accepted. Where a complaint is made orally the NIIC, the AFP, the NCA or any other formal recipient should be entitled to require the complainant to reduce the complaint to writing at any time or to provide sufficient information so

that the complaint may be reduced to writing. The Commission is also of the view that the provisions relating to complaints made by people in custody should continue.

### **Recommendation 124 - Receiving complaints**

The legislation should specify that complaints can be lodged with the NIIC, the Commonwealth Ombudsman, the AFP, the NCA and the NIIC. The complainant would be able to nominate an agent to act on his or her behalf.

### **Recommendation 125 - Complaints lodged with Ombudsman**

The legislation should specify that complaints lodged with a Commonwealth Ombudsman's office should be forwarded to the NIIC within 48 hours of receipt. Confidentiality obligations should also apply.

### **Recommendation 126 - Other possible reception points**

Consideration should be given to State and Territory anti-discrimination bodies, ICAC, the CJC and the NSW PIC as well as other State and Territory external agencies for handling police complaints as possible reception points for complaints against the AFP and the NCA. These bodies should be consulted as to their availability and capacity.

### **Recommendation 127 - Methods of making complaints**

Written and oral complaints should continue to be accepted. Where a complaint is made orally the NIIC, the AFP, the NCA or any other formal recipient should be entitled to require the complainant to reduce the complaint to writing at any time or to provide sufficient information so that the complaint may be reduced to writing.

### **Recommendation 128 - Complainants in custody**

The provisions of the Complaints Act relating to complaints made by people in custody should be retained.

## **Recording complaints**

### *Current situation*

15.8 Currently the Act requires various particulars of complaints which are referred to the IID to be recorded.<sup>717</sup> The particulars that must be recorded are set out in the Complaints Regulations and include:

- the names of the complainant, the AFP appointee who is the subject of the complaint, the AFP appointee to whom the complaint was made (if applicable) and the investigator
- the dates of the making of the complaint or the referral from (or to) the Ombudsman (as applicable) and of any referral from the Disciplinary Tribunal to the Commissioner for further investigation
- a description of the substance of the complaint
- the details and outcome of any charge.<sup>718</sup>

15.9 More limited recording requirements are imposed on the Ombudsman.<sup>719</sup> There are also annual reporting requirements placed on the IID<sup>720</sup> and the Ombudsman<sup>721</sup> concerning police complaints. The specific requirements for annual statistics include details of the total number and different types of complaints, the number of complaints which were substantiated, unable to be substantiated, not substantiated or withdrawn, the number of complaints in which the complainant and AFP appointee were reconciled and

the number that it was determined should not be investigated.<sup>722</sup> At present, only the name, rank and number of the AFP appointee who is the subject of the complaint must be recorded.<sup>723</sup> Other useful information could be obtained for assessing the operations of the complaints system or of the police.<sup>724</sup>

### ***Issues***

15.10 There is considerable evidence that police may under-record complaints.<sup>725</sup> This is often due to an antagonistic or defensive attitude towards the complaints system. Under-recording of complaints may be reduced by changing the police's perception and culture.

15.11 The issues paper asked whether there should be a requirement to record more comprehensive details about the complainant such as

- the complainant's sex
- whether the complainant is a juvenile
- the language spoken at home
- the ethnicity of a complainant
- whether the complainant is Aboriginal
- whether the complainant is disabled.

15.12 A number of submissions to the issues paper suggested that such information if it is to be accurate must be collected from the complainant. Requests for this information might cause complainants to feel discriminated against or threatened. The Ombudsman submitted that her office was currently exploring how to obtain useful data about ethnicity and other demographic data without discouraging complainants by asking intrusive questions. The Ombudsman believed that other methods such as surveys were preferable ways of obtaining this information.

15.13 The Ombudsman questioned whether it is useful to prescribe legislatively any further details than those above as she believes the categories under which it is important to record details will change over time. The Federal Privacy Commissioner submitted that deriving further details about AFP appointees from existing personnel records would be likely to fall under Information Privacy Principle 10<sup>726</sup> so long as the use of such information was confined to internal management purposes within the agency concerned. However, as the use of the information for this purpose would not have been envisaged at the time when the information was collected the Commissioner thought it would be wise to consult with staff first as not to do so could discourage staff from providing such data in future. At the same time any use of such data would need to be carefully monitored to ensure that officers or staff could not be identified despite not being named.

### ***DRP proposals***

15.14 The Commission considered that the collection of any additional information as listed above in relation to complainants should be voluntary and this should be explained to the complainant along with an explanation of the reason why the information is collected and any persons or agencies to whom the information might be disclosed.

15.15 The Commission proposed that no further details for complainants, for AFP appointees or the complaint itself should be specified in the legislation as it would be making the process too rigid when what is necessary is targeted research. A legislative requirement of more detailed information in every case would create delays and additional costs and would also run the risk of intimidating complainants. If the NIIC as part of its research function wanted further information about complainants and AFP or NCA officers it should conduct such research on a voluntary basis and by other means such as surveys.

## *Submissions*

15.16 The Ombudsman strongly supported the Commission's proposal that no further details of complainants, AFP appointees or the complaint itself, other than those already taken, should be specified in the legislation.<sup>727</sup>

## *Commission's views*

15.17 In chapter 2 the Commission noted the benefits of adding details of management action taken in response to complaints. Management action should be added to the particulars specified in the current legislation.

### **Recommendation 129 - Recording complaints**

The current provisions for particulars required should be maintained but with the addition of management action taken in response to the complaint.

### **Recommendation 130 - Additional information from complainants**

The collection of personal information relating to complainants should be collected through surveys and other research processes from complainants on a voluntary basis only. Survey and research work might include information such as

- the complainant's sex
- whether the complainant is a juvenile
- the language spoken at home
- the ethnicity of a complainant
- whether the complainant is Aboriginal
- whether the complainant is disabled.

Any request for information should be explained to the complainant along with an explanation of the reason why the information is being collected and any persons or agencies to whom the information might be disclosed.

### **Recommendation 131**

No further details of complainants, AFP appointees or the complaint itself should be specified in the legislation.

## *Failure to record a complaint*

15.18 **DRP proposals.** Failure to record a complaint may constitute a disciplinary offence under the broad provisions of AFP General Order 5. However, the Commission considered that a specific offence was desirable. The recording of complaints constitutes a fundamental part of an effective and fair complaints system. A failure to record obstructs the whole process. It may frustrate potential complainants, allow police who have misconducted themselves to escape detection and appropriate sanction and it may contribute to a misleading picture of the performance of the law enforcement agency. Under-recording of complaints is a significant problem that must be addressed. The Commission proposed that a deliberate failure to record a complaint should be a criminal offence while a negligent or careless failure to record a complaint should be a specific disciplinary offence.

15.19 **Submissions.** The Ombudsman supported a criminal offence of deliberately failing to record a complaint.<sup>728</sup>

15.20 The NCA and the Victoria Police considered it inappropriate that the deliberate failure to record a complaint should be a criminal offence.<sup>729</sup> The AFP argued that failure to record a complaint should attract

criminal sanctions only where the failure is deliberate and the allegation relates to the commission, or suspected commission, of a criminal offence or a prescribed disciplinary offence by an AFP appointee.<sup>730</sup>

15.21 *Commission's views.* The Commission maintains its support for the DRP proposal. A major practical difficulty is raised by the AFP's suggestion which is that the person recording a complaint is not usually in a position to always judge the seriousness of the complaint at the time of recording it. The failure to record complaints and the police tendency to under-record complaints is significant and common.<sup>731</sup> It is vital to the success of any complaints process that all complaints are recorded. The Commission is of the view that a change in police culture and attitudes is required in this area. The duty to record a complaint needs to be reinforced. Every NCA member, AFP appointee and member of the NIIC should know what duties are imposed upon them to record a complaint and the serious consequences that will follow a deliberate failure to do so. The Commission's proposals would achieve this policy.

15.22 The Commission believes that there should be a defence available where the person had a reasonable belief that

- there was no obligation upon him or her in the circumstances or
- he or she had discharged the obligation.

The NIIC in consultation with the AFP should determine what obligations should be on classes of members in recording complaints.

### **Recommendation 132 - Recording complaints**

The recording of complaints by an officer who is under a duty to do so should be a legislative requirement. A deliberate failure to comply with the duty to record a complaint should be a criminal offence, while a negligent or careless failure to comply with the duty to record a complaint should be a specific disciplinary offence. A defence should be available where the person had a reasonable belief that there was no obligation upon him or her in the circumstances or he or she had discharged the obligation.

## **Information and advertising**

### *Issues*

15.23 There is a need for greater public accessibility to the AFP and NCA complaints systems. Advertising and information strategies should target those most likely to be unaware of the system or who lack the confidence to use it. Campaigns should be directed towards youth, ethnic groups, women, gays and lesbians, Aborigines and Torres Strait Islanders and the socially disadvantaged.

### *DRP proposals*

15.24 The DRP proposed that information campaigns should be conducted in innovative and accessible ways. For example, in targeting youth, the NIIC might consider making itself available for interviews or providing information that could be played on television or radio programs that have a large youth audience. Advertising and information could be directed towards youth magazines and newspapers as well as schools, 'drop in' centres, sporting organisations, welfare organisations and other venues that cater for a youth audience. The NIIC should consult with youth workers and others working in the field to ensure that its advertising campaigns are run in ways that are accessible to, and effective for, targeted groups such as youth.

15.25 Information for groups from non-English speaking backgrounds should be directed towards the ethnic press and radio and other services which are used by ethnic groups. Information for indigenous Australians could be disseminated through ATSIC, the Aboriginal Legal Service and through media programs and information outlets delivering services to indigenous Australians.

15.26 Information should also be disseminated in appropriate places including police stations, community legal centres, migrant centres and prisons. There could be a complaints against police 'hotline' under the supervision of the Commissioner for Complaints. The Commissioner for Complaints should employ an Aboriginal and Torres Straits Islander liaison officer and should put in place outreach programs to contact members of ethnic communities and other groups with special needs. Each of these measures would involve some additional resources but it should be recognised that simply translating information into different languages or providing pamphlets will not ensure broad access to the complaints system. Innovative campaigns should also be conducted to target other specific groups such as women and the gay and lesbian community. Both mainstream and alternative avenues should be explored and the focus should be on both written and oral presentations to ensure that those with literacy problems are not excluded from the information campaign.

### ***Submissions***

15.27 The Victoria Police noted that both it and the Victorian Deputy Ombudsman (Police Complaints) provide after-hours emergency contact numbers to access on-call services for people wishing to make complaints.<sup>732</sup>

### **Recommendation 133 - Information and advertising**

The NIIC in consultation with the Commonwealth Ombudsman should conduct advertising and information campaigns in innovative and accessible ways targeting youth, women, gays and lesbians, Aboriginal and Torres Strait Islanders, people from non-English speaking backgrounds and the socially disadvantaged. The NIIC should ensure that its campaigns are conducted both in written and oral forms so that those with literacy problems are not excluded.

### **Recommendation 134 - Greater accessibility**

The Commissioner for Complaints should

- operate a hotline for complaints against the AFP and the NCA
- have an Aboriginal and Torres Straits Islander liaison officer and

should conduct outreach programs directed at specific ethnic groups and other groups with special needs.

### ***A duty on the AFP to provide information***

15.28 **Issues.** The Commission asked whether there should be a duty on police to inform a person about the complaints system after any significant interaction with the police or a legislative requirement that those interrogated in police custody be advised that they have a right to make a complaint.<sup>733</sup> The majority of submissions which addressed these issues contended that there should be not be a legislative requirement on the police. Some submissions indicated that this would be tantamount to inviting complaints while others suggested that imposing this requirement would lead to police providing the information in such a way as to actively discourage potential complainants from taking up their complaints. However, the Ombudsman thought that there was some merit in this proposal.

15.29 **DRP proposals.** The Commission considered that it was not practical to place a duty on police to inform a person about the complaints system after any significant interaction with the police. This would be lead to complex debate about what constituted a significant interaction. However, the Commission was of the view that it is essential for people to know about their right to complain and that this right is as crucial as other rights during the investigative process. The Commission noted that there is a significant problem with people being unaware of their right to complain or being directly or indirectly intimidated or deterred from making a legitimate complaint. A legislative duty would ensure that people under arrest would be properly informed of their rights. It would be a positive reinforcement of the independence and effectiveness of the complaints system. Taping or video-recording of interviews would allow the method and manner of the

provision of the information by the police to be monitored so as to avoid intimidation of potential complainants.

15.30 As a consequence the Commission proposed an obligation on police to inform a person under arrest of the existence of the complaints process. Part 1C of the *Crimes Act 1914* (Cth) which deals with the obligations of police when investigating a Commonwealth crime should be amended to provide this duty.

15.31 **Submissions and consultations.** The NCA opposed the imposition of a legislative duty on law enforcement officers to inform people under arrest of the existence of the complaints process.<sup>734</sup> It preferred that this duty be part of the police procedures. It was also concerned that if a legislative duty was imposed, the amendment to the *Crimes Act* would require underpinning legislation to extend the duty to State and Territory police officers.

15.32 The Victoria Police did not support the Commission's proposal.<sup>735</sup> It preferred the Victorian model where there is a requirement for a 'non-involved supervising sub-officer or commissioned officer' to ask all persons interrogated by police whether they are satisfied with their treatment by police.

15.33 **Commission's view.** The Commission does not agree with the views of the NCA on this matter. A legislative requirement would best achieve the policy of ensuring that all who come in contact with the police in a significant event such as an arrest are aware of the existence of a complaints process. Further, the Commission supports the extension of the legislative obligation to State and Territory police officers when acting on behalf of the NCA.

15.34 Nor would advertising of the complaints system in police stations be enough to ensure that people are aware of their right to make a complaint. The Commission's proposal ensures that people who have been arrested or formally interviewed by the police will become aware of the complaints system. This avoids the significant problem experienced within many complaints systems where police officers intentionally or inadvertently persuade potential complainants not to exercise their right to make a complaint. The Commission supports the Victorian model in two important aspects. The Victoria Police procedure

- acknowledges that people subject to formal police interviews may also be potential complainants and,
- ensures that the officer involved in the taking of information regarding the complaints process is not involved in the arrest or interviewing procedure.

Importantly, the Victoria Police submission suggests that its procedures work well in practice. The Commission is of the view that these aspects of the Victorian procedure should be implemented for the AFP and NCA.

### **Recommendation 135 - A duty on the AFP to provide information**

There should be a legislative duty on police to inform persons under arrest or formally interviewed by the police of the existence of the complaints process. This information should be conveyed to the person by a non-involved supervising officer or commissioned officer. Part 1C of the *Crimes Act 1914* (Cth) should be amended to include this duty.

## 16. Special needs of the territories

### Introduction

16.1 This chapter discusses specific issues that arise in relation to complaints systems for the ACT, Jervis Bay and the external territories. The AFP has a community policing role in each of these territories.<sup>736</sup>

### The ACT

#### *Policing arrangements*

16.2 Around 60-70% of complaints against the AFP arise within the ACT because of the AFP's community policing role there. Complaints range from minor matters such as rudeness to more serious complaints such as wrongful arrest. When performing functions in the ACT, AFP members have all the powers conferred on them by the laws of the Commonwealth plus all the powers conferred on police by laws of the Territory.<sup>737</sup>

16.3 The *ACT (Self-Government) Act 1988* (Cth) provided the ACT Legislative Assembly with legislative power with respect to the ACT but it cannot pass legislation about the provision of police services in the ACT. The AFP provides policing services to the ACT in relation to its position as a self governing territory and also in relation to the ACT as the seat of the Commonwealth Government.<sup>738</sup> The ACT Government has entered into an arrangement with the Commonwealth Government in relation to those services. Under the arrangement the ACT Government funds the community policing component of the AFP's services in the ACT (estimated at 86.4% in 1993-1994) while the Commonwealth is responsible for funding the balance of the Territory's resources that contribute to a national service. Included in the ACT Government funding is a component related to IID investigations. The cost of investigation by the Ombudsman's Office into complaints against ACT police is also met by the ACT Government.

#### *Role of the ACT Government*

16.4 Under the Administrative Arrangements Order, the federal Attorney-General has responsibility for the AFP Act and the Complaints Act<sup>739</sup> and the Minister for Justice has portfolio responsibility for the AFP. The ACT Attorney-General has pointed out that, despite these arrangements, the ACT community views the ACT Attorney-General as the responsible minister when things go wrong in regard to community policing and the complaints process. The ACT Attorney-General relies on his attention being drawn to complaints against the police through media reports, representations from constituents and from other sources.

16.5 The Commission considers that it is important for the ACT Government to have clear and timely access to information about policing matters and complaints that arise in the ACT or that affect the ACT. This is appropriate because the ACT provides funding for the service and because the ACT community looks to the ACT Government to take responsibility for policing issues. Any information provided should be subject to privacy considerations particularly in relation to complainants and operational security.

16.6 The DRP proposed the following

- the AFP and NCA should be able to make recommendations or report to the ACT Attorney-General where the complaint relates to the ACT
- a protocol should be established for the timely notification by the AFP and NCA to the ACT Attorney-General about any complaint which raises significant public interest for the ACT
- the NIIC and the AFP should provide the ACT Attorney-General and the ACT Government with information and analysis about complaints against the AFP as they relate to the ACT.

## *Submissions*

16.7 The submissions from the Commonwealth Ombudsman and the ACT Attorney-General supported the thrust of the recommendations contained in the DRP in relation to the ACT.<sup>740</sup> The ACT Attorney-General suggested some minor changes that have been included in the formal recommendations below.

### **Recommendation 136 - The ACT**

The NIIC Act should allow the AFP or the NIIC to make recommendations or to report to the ACT Attorney-General and the Legislative Assembly where the complaint or matter relates to ACT policing (subject to privacy considerations).

### **Recommendation 137**

A protocol should be established for allowing the ACT Attorney-General to be advised as soon as practicable by the AFP or the NIIC of any complaint about ACT policing that raises significant public interest for the ACT ( subject to privacy considerations).

### **Recommendation 138**

Information and analysis about trends in complaints against the AFP should be provided annually by the AFP and the NIIC to the ACT Attorney-General and, through him or her, the ACT Legislative Assembly.

## **Jervis Bay**

16.8 Jervis Bay Territory is an area of 70 square kilometres on the New South Wales coast about 160 kilometres south of Sydney. The Territory's population includes the Royal Australian Naval College, Commonwealth public servants living in the Jervis Bay village, private leaseholders and a permanent Aboriginal population located in Wreck Bay village. The relationship between the AFP and the local Aboriginal community is discussed in chapter 17.

### *Special needs*

16.9 The main issues in relation to Jervis Bay are lack of community awareness about the complaints system and the lack of an accessible alternative to lodging complaints with the AFP. During consultations with the Commission, both the AFP and the Jervis Bay Territory Administration agreed to increase public awareness of the complaints system by use of pamphlets. The AFP also intends to give occasional presentations on the complaints system to community meetings. The Commission's consultations in Jervis Bay and the submission from the Department of the Environment, Sport and Territories (DEST) in response to the Issues Paper suggest that there may be some people who would be reluctant to lodge a complaint with the local AFP given the closeness of the small community. The Commission was informed that people were likely to take the view that because the complaint would be investigated by other AFP police it was not worthwhile jeopardising personal and sometimes professional relationships by making a complaint. The physical isolation of the territory from Canberra also makes it difficult to lodge a complaint with the Ombudsman or AFP officers other than those in Jervis Bay.

### *DRP proposals*

16.10 The DRP proposed that the NIIC should arrange with DEST for the Jervis Bay Territory Administration to be a lodging point for sealed complaints documents about the AFP for transmission to the NIIC. The Administration should be able to provide information to complainants about the complaints process and how to contact the NIIC. It should have available information leaflets about the complaints system.

## *Submissions*

16.11 The AFP's submission observed that DEST personnel handling complaints need to be subject to the same accountability, confidentiality and privacy requirements as apply to AFP appointees.<sup>741</sup> This would include the inclusion of a duty on certain DEST personnel to record complaints and criminal sanctions for deliberate failure to record complaints as discussed in chapter 15.

16.12 In relation to the Commission's proposal to set up a memorandum of understanding between the AFP and DEST, the AFP argued that there is no need for an arrangement for policing services in the Jervis Bay Territory because the AFP has a legislative responsibility pursuant to the AFP Act to provide such services.<sup>742</sup>

16.13 The Commission accepts that there is no legislative requirement for a memorandum of understanding between the AFP and DEST in relation to the policing of Jervis Bay. However, the Commission supports the view of DEST that a memorandum will help in the practicalities of policing Jervis Bay by improving the interaction between the two agencies.

### **Recommendation 139 - Jervis Bay**

The NIIC should arrange with the Department of the Environment, Sport and Territories for the Jervis Bay Territory Administration to be a lodgement point for sealed complaint documents about the AFP. It should be able to provide information to complainants about the complaints process and how to contact the NIIC. It should have available information leaflets about the complaints system.

### **Recommendation 140**

The AFP should enter into a memorandum of understanding with the Department of the Environment, Sport and Territories in relation to the policing of Jervis Bay.

### **Recommendation 141 - Requirements on non-AFP appointees**

Department of the Environment, Sport and Territories personnel handling complaints need to be subject to the same accountability, confidentiality and privacy requirements as apply to AFP appointees.

## **The external territories**

16.14 The AFP provides policing services to Norfolk Island, Christmas Island, and the Cocos (Keeling) Islands. This includes enforcement of Commonwealth laws and general policing under special arrangements entered into between the Minister for Justice and the administrators of these Territories.<sup>743</sup>

### *Norfolk Island*

16.15 Norfolk Island is situated in the Pacific Ocean about 1 700 kilometres east-north-east of Sydney with a population of around 2 000, about 1 500 of whom are permanent residents. About 46% of the permanent population are of Pitcairn Island descent while many others are from Australia or New Zealand. The Commonwealth can expressly provide that its legislation applies to Norfolk Island, and the legislation of the Norfolk Island legislature also applies to the Territory.<sup>744</sup> Ordinances of the Governor-General also apply.<sup>745</sup> In February 1993 the Minister for Justice and the Administrator of the Territory of Norfolk Island entered into an arrangement for the provision of police and ancillary services. This includes the protection of persons and property, crime prevention and detection, maintenance of peace and good order, enforcement of enactments and the development and maintenance of community needs in the provision of police services and ancillary services.

### ***Cocos (Keeling) Islands and Christmas Island***

16.16 Christmas Island is approximately 2 600 kilometres from Perth. Cocos (Keeling) Islands and Christmas Island are Indian Ocean islands off the Western Australian coast. The population of the Island is drawn from Singapore, Malaysia and the Cocos (Keeling) Islands. There are three main languages spoken, English, Malay and Chinese, with a number of different dialects.<sup>746</sup> The Cocos (Keeling) Islands comprise a group of 27 small coral islands 2 700 kilometres northeast of Perth. Two of the main islands, West and Home, are inhabited; West by about 200 Commonwealth and private sector employees and their families and Home by about 400 members of the Cocos Malay community. The laws governing the Cocos Islands and Christmas Island are provided by Commonwealth legislation applying to the External Territories, Ordinances made by the Governor-General under the *Cocos (Keeling) Islands Act 1955* (Cth) and the provisions of the law of Western Australia as in force in Western Australia from time to time in so far as they are capable of applying.

#### ***Police services***

16.17 The AFP provides regulatory services to the Cocos (Keeling) Islands and Christmas Island. 'Regulatory services' are defined as acts that are regulatory in nature but do not include the provision of police services or acts incidental or conducive to the provision of police services. Examples of regulatory services include motor vehicle regulation, driving licence testing and customs functions. AFP members are sworn in as and become members of the Norfolk Island Police Force under the *Norfolk Island Police Act 1931* (Norfolk Island) on taking up duty on Norfolk Island.

16.18 Submissions and consultations identified the following as major issues in respect of the complaints system in the external territories:

- accessibility
- training for AFP personnel
- translating and interpreting services.

#### ***Accessibility***

16.19 The Commission's consultations on Norfolk Island indicated that there is very little understanding of the existing complaints system and the role that the Ombudsman plays in the process. The AFP has recently commenced a community awareness program to inform members of the public of the procedures for making complaints against police.<sup>747</sup>

16.20 Lack of accessibility is also likely to be a significant problem on the Cocos (Keeling) Islands and Christmas Island. In fact it may be a greater problem on those islands because of their diverse cultural backgrounds. The population of Christmas Island is drawn from Singapore, Malaysia and the Cocos (Keeling) Islands. There are three main languages spoken, English, Malay and Chinese, with a number of different dialects.<sup>748</sup> Two of the main islands of the Cocos (Keeling) Islands are inhabited; West by about 200 Commonwealth and private sector employees and their families and Home by about 400 members of the Cocos Malay community.

16.21 Each of the three external territories is geographically isolated. None has any direct link with the Commonwealth Ombudsman's offices. People on these islands may be reluctant to make a complaint directly to the local AFP because of the smallness of the community and the few AFP appointees on the islands.<sup>749</sup> They could be concerned that their complaints would not be fairly dealt with or kept confidential.

16.22 The DRP proposed that the NIIC should arrange with the Department of the Environment, Sport and Territories for the respective administrations of Christmas, Cocos (Keeling) Islands and the Office of the Administrator of Norfolk Island to be lodgement points for sealed complaints documents about the AFP, for transmission to the NIIC. Each should be able to provide information to complainants about the complaints process and how to contact the NIIC. Each should have available information leaflets about the complaints system.

16.23 The DRP also proposed that the AFP in conjunction with the NIIC should develop a policy for increasing awareness of the complaints systems in the external territories.

### *Submissions*

16.24 The AFP's submission supported the Commission's proposals with the proviso that DEST personnel handling complaints observe the same accountability, confidentiality and privacy requirements as apply to AFP appointees.<sup>750</sup> This would include the offence of deliberately failing to record a complaint as discussed in chapter 15.

#### **Recommendation 142 - The external territories**

The NIIC should arrange with the Department of the Environment, Sport and Territories for the respective administrations of Christmas, Cocos (Keeling) Islands and the Office of the Administrator of Norfolk Island to be lodgement points for sealed complaints documents about the AFP, for transmission to the NIIC. Each should be able to provide information to complainants about the complaints process and how to contact the NIIC. Each should have available information leaflets about the complaints system.

#### **Recommendation 143**

The AFP in conjunction with the NIIC should develop a policy for increasing awareness of the complaints systems in the external territories.

### *Training for AFP personnel*

16.25 The AFP advised that there is no specific cultural awareness training for AFP members employed on the external territories although cultural awareness and understanding of multi-cultural issues, particularly for Christmas Island and Cocos (Keeling) Islands, are included in selection criteria for deployment. The AFP believed that it should do more to prepare staff for working in the external territories. It is investigating the cultural awareness and language training that the Department of Foreign Affairs and Trade (DFAT) provides for its staff prior to overseas deployment, with a view to supplementing its own training.

### *Submissions*

16.26 The AFP supported the Commission's proposals in relation to training for AFP personnel. The AFP noted that it has recently put into place training packages for members who are deployed to the Indian Ocean territories.<sup>751</sup>

#### **Recommendation 144 - Training for AFP personnel**

The AFP should develop specific training programs and induction packages for officers who are to work in the external territories. In developing these measures it should consider consulting with the Department of Foreign Affairs and Trade and the Department of Environment, Sport and Territories.

### *Translating and interpreting services*

16.27 As Cocos (Keeling) and Christmas Islands have significant numbers of their populations who are from non-English speaking backgrounds translating and interpreting services are very important. One concern discussed in the Issues Paper was the limited use of the Translating and Interpreting Service (TIS) on Christmas Island.<sup>752</sup> The AFP has submitted that because of legislative requirements for the recording of interviews it had not been equipped to use TIS in the police station on Christmas Island for a period of time. Interviews where TIS assistance was required were carried out in the Administration's office in order to use its conference telephone system. Suitable facilities have now been installed in the police station.

16.28 The AFP has advised that where it needs to interview a suspect or victim and an interpreter is likely to be required to appear in court, the practice on Christmas Island has been to enlist the services of local certified interpreters if the interviewee consents to this procedure. Local certified interpreters are also engaged by the Administration and the Shire Council.

16.29 The AFP has indicated that there are a number of issues that can arise in relation to translating and interpreting. An example is a situation where the services of a TIS interpreter speaking a particular Chinese dialect and the services of a Legal Aid solicitor could not be simultaneously obtained. Ultimately a local certified interpreter was used but approximately eight hours had elapsed from the time of the arrest until when charges were laid.

16.30 The value of TIS is limited in circumstances where a warrant is to be executed and an interpreter is required to explain the warrant to the person on whose premises it is to be executed given the detail and complexity of information contained in search warrants. The AFP considered that the preferable option is that interpreting issues arising from search and seizure warrants are addressed by using local certified interpreters to explain the nature and contents of the warrants and the procedures involved.

16.31 The AFP stated that on Cocos (Keeling) Islands there are a number of certified interpreters whose services are utilised by the police in addition to using TIS.

16.32 The Commission has considered the issue of the use of interpreters and translators more generally in chapter 17. It recommends that the AFP and the NCA should ensure that independent and appropriately trained and qualified interpreters and translators are used wherever there is an issue of proper comprehension because of linguistic reasons. This should especially be the case for formal interviews and statements.

### ***Submissions***

16.33 The Ombudsman's submission makes no comment in relation to the external territories.<sup>753</sup> This is unfortunate given the lack of community awareness of current complaints procedure, especially the external territories as documented above.

16.34 The Administrator of Norfolk Island and the Norfolk Island Minister for Health and Education supported the recommendations and the comments contained in the DRP.<sup>754</sup>

16.35 The AFP's submission supported the Commission's proposals in relation to training and interpreting services.<sup>755</sup> However, it urged some flexibility in the requirements for using interpreters to cater for the wide range of circumstances that AFP members may come across in the external territories.

16.36 A submission from a resident of Norfolk Island emphasised the importance of cultural awareness training for AFP members employed on that Island that took proper account of the special circumstances of the Pitcairn Island descendants.<sup>756</sup>

### **Recommendation 145 - Translating and interpreting services**

The AFP should develop a policy in relation to the external territories for the availability and use of independent and qualified interpreters and translators. This policy should be particularly focussed on Christmas Island and the Cocos (Keeling) Islands.

## 17. Groups who may have special needs

### Introduction

17.1 This chapter discusses groups in the community who may have special needs in relation to complaints against the NCA and the AFP. This includes Aborigines and Torres Strait Islanders, women, youth, gays and lesbians, people from non-English speaking backgrounds and people with disabilities.

17.2 The first part of this chapter deals with AFP and NCA personnel who are from these groups. The second part is concerned with possible difficulties for members of these groups external to these organisations.

### Part 1 - Internal complaints

#### AFP's EEO policy and grievance systems

17.3 The DRP proposed that the AFP should engage in a comprehensive education strategy on the productivity benefits of equal employment and opportunity (EEO) programs within the AFP. This proposal was made in response to submissions and evidence that suggested there was a strong degree of hostility within the AFP towards its EEO program. It was suggested that this hostility in part arose from a misunderstanding of how the EEO program worked and the benefits of such programs for the entire force. The DRP also proposed that the AFP continue to consult with bodies such as the Office of the Status of Women to monitor its EEO program and grievance procedures.

#### *Submissions*

17.4 The Victoria Police stated that it thought these proposals were appropriate.<sup>757</sup> Ms Vasiliki Nihas, a consultant to the inquiry, believed that members of the NCA or AFP who would sit on recruitment panels and promotion panels needed to be adequately trained in assessing applicants' support for, and understanding of, EEO principles, but also to ensure that those members were correctly applying those principles in making selections. The Commission agrees with this view.

#### **Recommendation 146 - EEO**

Education of officers on the productivity benefits of an EEO program is essential to effect desired long term changes in AFP culture and to promote EEO. The AFP should consider consulting with bodies with relevant expertise and experience such as the Office of the Status of Women as it continues to develop its EEO program and grievance procedures.

#### **Recommendation 147**

NCA and AFP members who sit on recruitment and promotion panels need to be adequately trained to assess applicants in relation to EEO and also to ensure they correctly apply the principles of EEO to the selection process.

### NCA's EEO policies and grievance procedures

17.5 The DRP stated that there was little available information about the NCA's current EEO program and invited comments.

#### *Submissions*

17.6 The NCA advised that its National Strategic Plan for Equal Employment Opportunity 1994-97 was signed by the Chairperson and union representatives following its adoption at the National Consultative Council. The plan has been submitted to, and approved by, the Public Service Commission (PSC) in accordance with legislative requirements. The plan drafted jointly by management and unions was written in

accordance with the PSC's 'New Model for EEO Programs' and restates the NCA's commitment to EEO through four underlying principles:

- all staff are selected on merit
- all staff are given the opportunity to reach their full potential
- workplaces are free from unlawful discrimination and
- managers are responsible for ensuring that the workplace accommodates the legitimate needs of all staff and is free from discrimination and harassment.

17.7 The plan aims to:

- identify strategies which will eliminate and prevent direct and indirect discrimination, especially against members of EEO groups, in all aspects of human resource management
- define strategies to overcome barriers to career progression for members of the EEO groups and
- develop all staff to their potential.

17.8 The National EEO Committee which consists of two management and two staff representatives reviews progress on implementation and achievement of the Plan.

17.9 The NCA has also conducted EEO briefing sessions on sexual harassment for all staff including seconded police officers. These sessions are designed to familiarize staff with the definition of sexual harassment, what kinds of behaviour constitute sexual harassment and strategies for the prevention and elimination of sexual harassment.

17.10 The NCA's National Strategic Plan for EEO is co-ordinated by the Director of Human Resources in the National Office. An Employee Relations Officer has been appointed to co-ordinate EEO throughout the organisation and there are EEO contact officers and sexual harassment contact officers located in each of the NCA's offices.

17.11 Although the NCA's current EEO database does not record EEO data for seconded police (about 20% of NCA staff) this will be rectified when resources permit. The NCA submitted that there were no EEO related grievances notified during the 1995-96 year while the number of women in Senior Officer Grade A and B positions was only slightly increased from that of the previous year but still compared well with the Australian Public Service indicator of 20%.<sup>758</sup>

## **Women in Policing Conference**

17.12 In July 1996 the first Australasian Women Police Conference was held in Sydney. Around 300 delegates from New Zealand, Papua New Guinea, South-East Asia and throughout Australia participated in the conference.

17.13 The federal Attorney-General told the conference that statistics illustrated that Australia-wide only 28 police women occupied commissioned ranks compared to 1 724 men and that women were also leaving police services in large numbers. Other papers presented at the conference showed that women still faced discrimination and sexual harassment in a work environment that remained highly gendered. This had many serious consequences including evidence that working in such a highly gendered and hostile environment contributed to twice as many female officers 'binge drinking' as their male colleagues.

17.14 Recommendations from this conference included:

- establishing a Council of Australasian Women Police to develop policies and practices relevant to the employment of women in policing

- establishing an Australasian Police Women's Advisory Group to advise the Senior Officers Group and Australian Police Ministers Council on issues affecting women police
- undertaking exit interviews and interviews with former women police to identify reasons why women leave the policing environment
- conducting national research on the issues and problems facing women in policing
- developing best practice in EEO strategies and management
- reviewing existing policies and practices in order to improve the numbers of women in policing and enhance their career opportunities
- improving working conditions for women police by identifying where improvements are required and introducing more flexible rostering practices and part time opportunities
- recognising the need for women police as part of their job to network both internally and with outside professional groups, community organisations and government departments and to develop work plans and roster arrangements that enable women to take part in these networking activities
- improving procedures for dealing with sexual harassment
- improving the capacity of supervisors to deal appropriately with women in policing
- addressing the needs of senior women in police management through programs at the Australian Institute of Police Management including a national women police mentoring project
- improving training, both in respect to the needs of women police and in relation to gender issues.

17.15 The Commission endorses these recommendations. They will assist in ensuring that women are given appropriate opportunities in law enforcement.

### **Recommendation 148 - Women in policing**

The Commission supports the recommendations made at the first Australasian Women Police Conference and encourages the AFP and the NCA to actively participate in implementing the recommendations in their own organisations and throughout the Australasian law enforcement environment.

## **Part 2 - External complaints**

### **AFP complaints system and Aborigines and Torres Strait Islanders**

17.16 The Ombudsman submitted that in the past Aboriginal and Torres Strait Islander communities have had little trust in the AFP complaints system but recently there has been some increase in complaints being lodged by members of indigenous communities. The Ombudsman thought it essential that her office play a much greater role in supervising or directly investigating complaints as members of indigenous communities were more likely to have faith in the system if they were confident that their complaint would be independently supervised or independently investigated.

#### ***Relations in the ACT***

17.17 In the AFP 's view the relationship between the Aboriginal community in the ACT and the AFP is good with AFP management regularly liaising with Aboriginal leaders. AFP police members are undergoing a second round of cultural awareness training. Aboriginal cross-cultural awareness training is provided by consultants<sup>759</sup> who aim to explore cultural awareness within a framework of anti-racist thinking. Members

discuss information about Aboriginal and Torres Strait Islander culture and are asked to explore attitudes and behaviours towards those cultures and to reflect on their own attitudes and the formation of those attitudes.

### ***Jervis Bay***

17.18 The Ombudsman stated that Jervis Bay was a long way from a Commonwealth Ombudsman's office and that complaints could only be made to the AFP appointees themselves.

17.19 The AFP thought that the Wreck Bay Aboriginal Community in Jervis Bay and those AFP members stationed at Jervis Bay shared a good working relationship. Meetings of the officer-in-charge and the Wreck Bay Aboriginal Community Council (WBACC) take place on an informal basis. The WBACC has indicated that it does not wish for a more formal liaison committee at this stage.

17.20 The Commission held meetings in Jervis Bay and invited comments from members of the community.

17.21 The consultations indicated that there are no special difficulties in the relationship between the AFP and the Aboriginal community. The Commission understands that the AFP is considering appointing an Aboriginal liaison officer for the area. This would be a useful measure. The community should be consulted about the position and the necessary background and skills of the person. The AFP should continue to ensure that any AFP officer who is to work in Jervis Bay has undergone the cross-cultural awareness training and can demonstrate an understanding of its principles and a capacity to act accordingly. The AFP should also consider the appointment of Aboriginal officers in the area given the significant Aboriginal population but those decisions should take into account suitability and operational requirements.

### ***Special representation***

17.22 The Royal Commission into Aboriginal Deaths in Custody recommended that in the adjudication of complaints made by or on behalf of Aboriginal persons one member of the review or adjudication panel should be an Aboriginal person nominated by an appropriate Aboriginal organization(s) in the State or Territory in which the complaint arose. It also suggested that the panel should contain a person nominated by the Police Union or similar body.

17.23 The Commission understands the reasoning behind this recommendation but considers that its implementation would create a number of significant difficulties. There may be considerable problems in finding an Aboriginal person acceptable to a wide cross section of the indigenous communities. Such an approach might also alienate other members of the community who will question why one group apparently receives special treatment. There would also be a likelihood of polarisation between the Aboriginal representative and the AFP Union representative leading to the body being unproductive.

### ***DRP proposals***

17.24 The DRP proposed that the best strategy in relation to determining complaints was to ensure that decision makers have effective cross-cultural communication training. The NIIC as the proposed primary investigatory body should develop its own cross-cultural communication programs and strategies, particularly for those staff who deal with complaints. The DRP also proposed that the NIIC should have an Aboriginal and Torres Strait Islander liaison and support officer to assist, where appropriate, Aboriginal or Torres Strait Islander complainants. That officer should help to publicise the complaints system amongst Aboriginal and Torres Strait Islander communities.

### ***Submissions***

17.25 The Victoria Police stated that the proposals would seem appropriate but were ultimately a matter for the NIIC to determine. The Victoria Police also submitted that while it was appropriate for the NIIC to develop links with the Aboriginal and Torres Strait Islander Commission (ATSIC), similar links should be established with all sections of the community, including police, if the NIIC was to maintain credibility as a truly independent agency concerned with the interests of the entire community.<sup>760</sup>

### **Recommendation 149 - Cross-cultural training**

Decision makers in the AFP and NCA complaints and disciplinary systems should have effective cross-cultural communications training. The NIIC as the proposed primary investigatory body should also develop its own programs and strategies particularly for those who deal with complaints.

### **Recommendation 150 - Aboriginal and Torres Strait Islander liaison and support**

The NIIC should employ an Aboriginal or Torres Strait Islander liaison and support officer in relation to assisting, where appropriate, Aboriginal or Torres Strait Islander complainants. The officer should also assist in helping to publicise the programs amongst Aboriginal and Torres Strait Islander communities.

### **Recommendation 151**

The NIIC should establish links with relevant bodies concerned with Aboriginal and Torres Strait Islander interests.

## **People from non-English speaking backgrounds**

17.26 The DRP recommended that the AFP and the NCA should try to ensure that independent and appropriately trained and qualified interpreters and translators are used wherever there is an issue of proper comprehension because of linguistic reasons. This should be especially the case for formal interviews and statements.

### ***Submissions and consultations***

17.27 The National Police Ethnic Advisory Bureau submitted that the Commission should provide a stronger and more positive recommendation. It suggested the following wording: the AFP and the NCA should *ensure* [emphasis added] that appropriately trained and qualified interpreters and translators are engaged to ensure effective communication between the AFP and/or the NCA and people from non-English speaking backgrounds (NESB). The Bureau also suggested that the interpreters and translators should satisfy the standards of the National Accreditation Authority for Translators and Interpreters (NAATI) which is the national testing agency. The Bureau argued that the use of professional interpreters and translators where necessary is a vital part of achieving access and equity for all people in dealing with law enforcement agencies.<sup>761</sup>

17.28 Ms Vasiliki Nihlas, a consultant to the Commission, said that police needed training in when and how to use interpreters. The training should help police to identify when an interpreter was necessary and the most effective way of using an interpreter.<sup>762</sup>

17.29 The Ombudsman submitted that the need to ensure that interpreters are used when required is particularly important to women of non-English speaking backgrounds who may have had fewer opportunities to develop English language skills than men in their communities.<sup>763</sup>

17.30 The AFP supported the DRP proposal but argued that such a policy needed to be sufficiently flexible to cater for all the practical difficulties such as the lack of qualified interpreters in the external territories and the lengthy delays that could often occur in finding an interpreter.<sup>764</sup>

### ***Commission's view***

17.31 The Commission used the phrase 'try to ensure' to take account of the fact that there will be competing priorities for the AFP's resources and that, particularly in some remote areas of the AFP's jurisdiction, independent and appropriately trained and qualified interpreters may not be readily available. While the Commission agrees with the principle behind the Bureau's rewording it doubts that it can be fully implemented in practice because of the exigencies of operations and investigations and the limited resources

available. Nevertheless, the Commission acknowledges the need for the principle of firm commitment as suggested by the Bureau and the Race Relations Commissioner.<sup>765</sup> The AFP and NCA should devise a process to record and explain failure to comply with the principle.

### **Recommendation 152 - Interpreters and translators**

The AFP and the NCA should ensure that interpreters and translators who satisfy the standards of the National Accreditation Authority for Translators and Interpreters are used wherever there is an issue of proper comprehension because of linguistic reasons. This should be especially the case for formal interviews and statements.

The AFP and NCA should monitor the implementation of this principle and explain failures to meet its requirements.

### ***Racially prejudiced behaviour***

17.32 The DRP proposed that there should be no specific proceeding against racially prejudiced behaviour. It suggested that while such a proceeding might have some educative value, the key task is to improve internal culture and attitudes so that improper behaviour does not occur in the first place. Further, there is a view, commonly held by many AFP officers, that the disciplinary system is overly regulated and complex and that new proceedings will only add to that concern. The Commission was concerned that a new proceeding would be likely to meet with indifference or antipathy. For those cases where disciplinary action is appropriate then there is scope under the current proceedings to take action.

### ***Submissions***

17.33 The Attorney-General's Department suggested that racially prejudiced behaviour was already covered by regulation 18 of the existing AFP discipline regulations, but that the inclusion of such a specific offence might have educative value.<sup>766</sup> Others who thought the offence might have merit were the Ombudsman<sup>767</sup> and the Department of Immigration and Ethnic Affairs.<sup>768</sup> The National Police Ethnic Advisory Bureau acknowledged that the key task is to improve the internal culture, but argued that is a long term process and it is necessary to have disciplinary regulations in place which clearly state the unacceptability of racially prejudiced behaviour by members of the AFP and the NCA.<sup>769</sup> Such an offence makes a powerful statement about the need to eliminate any form of racism, bigotry and prejudice from the AFP and the NCA.

### ***Commission's view***

17.34 Inquiries and research indicate that racist attitudes and conduct continue to be a problem amongst some members of the Australian law enforcement community.<sup>770</sup> The Commission accepts that it is important to use all appropriate measures to send the message that the AFP and the NC do not accept racist behaviour within their organisations or in their interaction with the community. The Commission therefore endorses the addition of a misconduct proceeding for abuse of authority or improper action on the grounds of another person's race, ethnicity, national origins, cultural or religious beliefs. The addition of this proceeding will not add any significant complexity to disciplinary proceedings.

### **Recommendation 153 - Racially prejudiced behaviour**

There should be a misconduct proceeding for the AFP and the NCA available against an officer who abuses his or her authority or acts improperly on the grounds of another person's race, ethnicity, national origins, cultural or religious beliefs

### **Gays and lesbians**

17.35 The ACT Gay & Lesbian Anti-Violence Project and the AFP are currently working together to reduce fear amongst the gay and lesbian community in accessing police services. There are two gay and lesbian liaison officers with the AFP and community workshops have been conducted by the AFP addressing such

issues as reporting processes, client rights and delivery of service complaints about the AFP. There is also a public relations media campaign and regular liaison with leaders in the gay and lesbian community.<sup>771</sup>

17.36 The Aids Action Council of the ACT has suggested that a formal police policy regarding the policing of beats in the ACT could lead to a significant change for beat users in their relations with police and a more co-operative atmosphere for outreach activities. A beat policy should ensure that plain clothed policing was a last resort and that preventing violence at beats should remain the first priority.<sup>772</sup>

#### **Recommendation 154 - Policing beats**

The AFP should develop a formal policy for the policing of beats and should consider the policy developed by the NSW Police Service.

#### **Recommendation 155 - Gay and lesbian issues**

The AFP should provide training to all members and staff members to encourage attitudes of acceptance of gays and lesbians within the workplace and within the community.

The AFP's policies and performance on these issues should be monitored and examined in consultation with relevant community groups.

### **Women**

17.37 A major issue to consider in relation to the AFP are the policies and responses of the AFP within the ACT to domestic violence.

#### ***Domestic violence***

17.38 According to the Ombudsman there is a need to ensure that female investigators are available where complaints involve allegations of domestic violence, sexual slurs, harassment or sexual assault. This was essential in the first interview.

17.39 The DRP sought comment on the current AFP response to domestic violence.

#### ***Submissions***

17.40 The Office of the Status of Women has submitted that police need to be clear about their law enforcement role and not confuse this with a conciliator role which might minimise the seriousness of the violence and may jeopardize the safety of the victim. The Office believes that training should be given to all new recruits and refresher training to all officers at appropriate intervals. The content of that training should be consistent with the guidelines of the National Committee on Violence Against Women and the National Strategy on Violence Against Women. The Office also submitted that a specialist domestic violence unit is a way of ensuring a consistent approach through policy and training and through the monitoring of police practice. Police should have clear guidelines on charging and on their powers of arrest where a criminal offence has occurred.<sup>773</sup>

17.41 The AFP submitted that its ACT region police respond to incidents of domestic violence as a matter of priority as these disturbances are considered to be potentially life threatening situations. The primary role of police upon attendance is to prevent violence and to defuse hostility. The AFP regularly liaises with the Domestic Violence Crisis Centre.<sup>774</sup>

17.42 The Domestic Violence Crisis Service Inc (DVCS) stated that its close working association with the police and domestic violence victims had revealed that incidents of domestic violence were not always treated as a priority and that the police were inclined to respond to domestic violence as being suitable for a civil remedy such as a DVO rather than as an infringement of the criminal law. The DVCS supported the Office of the Status of Women's view that police must be appropriately trained, that there should be a

specialist domestic violence unit and that there needed to be an arrest response where a criminal offence has occurred.

17.43 The DVCS said that its experience was that police commonly told women that there was nothing the police could do if the victim did not have a domestic violence order. The DVCS agreed with the recommendations made by the ACT Community Law Reform Committee in relation to a pro-arrest policy. The DVCS believed that a pro-arrest policy must have a monitoring system to be effective. It also said that a specialist domestic violence unit should be set up with liaison officers located within the unit. It said at present there were no police domestic violence liaison officers and it was unclear what role Victims of Crime officers played in relation to domestic violence.

17.44 The DVCS said that women escaping domestic violence would often not make complaints because of low self esteem and vulnerability. Accordingly, there should be a 'safety conscious' complaints mechanism set up within a police domestic violence unit, accessible to and supportive of victims.<sup>775</sup>

### **Recommendation 156 - Domestic violence**

The AFP strategy in relation to domestic violence in the ACT should include the following matters.

- Police need to be clear about their law enforcement role and not confuse this with a conciliator role which might minimise the seriousness of the violence and may jeopardise the safety of the victim.
- Training should be given to all new recruits and refresher training to all officers at appropriate intervals. The content of that training should be consistent with the guidelines of the National Committee on Violence Against Women and the National Strategy on Violence Against Women.
- Police should have clear guidelines on charging and on their powers of arrest where a criminal offence has occurred.
- Police regional instructions should direct police to charge where police have reasonable grounds to believe that a criminal offence has occurred in the context of domestic violence.
- The regional instructions should specify that the practice of referring the victim to a service to obtain a domestic violence protection order or a restraining order as a substitute for charging is unsatisfactory and unprofessional.
- The decision about whether to charge should be made by the police and not by the victim. Both victim and offender should be told that the police will decide whether to charge.<sup>776</sup>

There should be a specialist domestic violence unit to

- drive and monitor the implementation by police of the ACT Domestic Violence Strategy
- provide support and advice to other police on domestic violence matters
- monitor the quality of domestic violence responses by the police
- liaise with external agencies and victims
- undertake police domestic violence training
- undertake law reform activity
- co-ordinate police-community education initiatives.<sup>777</sup>

The Unit should also

- have a Domestic Violence Liaison Officer
- recognise the need for new instructions on exercising the power to arrest and to grant bail, and on the timing and content of training for police on domestic violence.

## ***Strip searches***

17.45 There are particular concerns about the use of strip searches in relation to women. The DRP called for comments on the AFP's use of strip searches.

17.46 The Coalition Against Police Violence (CAPV) submitted that a survey that it conducted in Canberra in relation to the AFP strip searches indicated that AFP officers frequently failed to comply with the requirements of the *Crimes Act 1914* (Cth). This included matters such as

- the location of the search
- the sex of the officers in whose presence the search took place
- the obligation where the person was between 10 and 18 to have either arrested that person or have a magistrates order and to conduct that search in the presence of a parent or guardian of the person.

17.47 Guideline 21 of the AFP (ACT Region) Regional Guideline 5/96 states that the following details of any search should be recorded where prisoners held in custody are searched:

- the names of those other members present at the search
- the area where the search was conducted
- the precautions taken for the privacy of the person being searched and
- details of the items discovered as a result of the search.

17.48 The CAPV submitted that when it requested the AFP to provide data collected under this guideline the AFP advised that such information was recorded against prisoner records within the police computer system and statistical retrieval was not possible. The CAPV submitted that in order to improve police accountability, it was important for the community to be able to access statistical data on strip searching of people in custody.<sup>778</sup>

17.49 The Ombudsman has advised that as part of one of her current 'own motion' investigations into the AFP's treatment of youth, the AFP's search practices including strip searches are being examined. The Ombudsman indicated that although the investigation was incomplete there were some concerns about the AFP's personal search practice.<sup>779</sup>

### **Recommendation 157 - Strip searches**

The AFP Commissioner should consider the imminent Ombudsman's report on strip searches and determine in conjunction with the Ombudsman any changes to rules, procedures, training and information. The results of the Ombudsman's report should be available to the NIIC and considered by it.

## **Youth**

17.50 As mentioned above, the Ombudsman has advised that it is currently undertaking its 'own motion' investigation into the treatment of youth by AFP officers. This investigation arose from concerns about the AFP's treatment of youth, in particular, whether protections for youth under relevant legislation were being observed in practice.

17.51 On 7-9 July 1995 the National Police Ethnic Advisory Bureau (NPEAB) and representatives of the youth sector held a first national summit on police and ethnic youth relations. The summit recommended that

- the Bureau establish a Working Party of representatives of young people and youth peak advocates to monitor the implementation of the summit recommendations

- the Bureau recommend to the Conference of Commissioners of Police the development and implementation of a national integrated strategy on police and ethnic youth relations
- the Bureau seek funding from suitable sources such as the Office of Multicultural Affairs, the Australian Multicultural Foundation, the Department of Employment Education and Training and the Department of Immigration and Ethnic Affairs to conduct a national audit of best practice strategies on police and ethnic youth relations from the various initiatives being undertaken around the States and Territories
- the Bureau seek endorsement from police commissioners and take up with State and Territory police services the development of an anti-racism policy, more effective methods of data collection on ethnic youth demographics and a re-examination of training and recruitment
- State and Territory police services, particularly their ethnic affairs units, expand joint police-community initiatives such as youth and community consultations, school programs and other outreach activities
- the Bureau, State and Territory ethnic affairs units, youth advocates and young people themselves examine the development of a joint project with the media industry and unions which helps to foster more positive images of police and youth and their relations
- police, local government, housing, community services, the community sector and other relevant agencies establish inter-departmental committees at the State and Territory level on police and ethnic youth relations
- State and Territory justice departments provide on-going funding for legal services for young people, in particular, ethnic young people, to provide effective information and advice on legal rights
- the Bureau recommend to Commissioners and each State and Territory service that they establish an independent complaints mechanism for handling complaints from young people
- youth delegates attending the first national summit on police and ethnic youth relations form a Youth Network to support and resource their work at the local level and in particular to share information and ideas.

17.52 The Commission generally endorses these recommendations as a worthwhile step in establishing a national strategy and suggests that the AFP and the NCA should consider these initiatives and participate as appropriate.

### **Recommendation 158 - Youth**

The Commission endorses the recommendations of the first national summit on police and ethnic youth relations and suggests that the AFP and the NCA should consider these initiatives and participate as appropriate.

### **Recommendation 159**

The AFP should consider the Ombudsman's report on youth and determine in conjunction with the Ombudsman any changes to rules, procedures, training and information. The results of the Ombudsman's report should be available to the NIIC and considered by it.

### **Recommendation 160**

The AFP and NIIC should also consult with peak youth organisations on appropriate methods of providing information and education about the complaints procedure to youth.

## **People with disabilities**

17.53 The *Disability Discrimination Act 1992* (Cth) (DDA) makes it unlawful to discriminate against people on the basis of disability in a broad range of activities, particularly in the areas of employment, access to goods, services and facilities, access to premises used by the public and the administration of Commonwealth laws and programs. The phrase 'people with intellectual and physical disabilities' does not cover the full range of disabilities covered by the DDA. The definition of disability under the Act is very broad and includes physical, sensory, intellectual, learning and psychiatric disabilities as well as physical disfigurement. Any policy on the response to people with a disability should consider the definition of disability provided for under the DDA.

17.54 The Disability Commissioner has advised that the DDA exemption for disability discrimination when it is the result of direct compliance with a prescribed law such as statutory medical requirements ended on 1 March 1996 thus requiring the AFP to consider the full range of employment issues including recruitment. The AFP must ensure that people with disabilities have equal access to the AFP's services and to the laws and programs administered by the AFP.

17.55 The Disability Commissioner also submitted that any recruiting strategy or testing of staff, for example, psychological testing, should comply with the provisions of the DDA.

17.56 According to the Disability Commissioner any information strategy must overcome barriers which are common to people with disabilities. Examples of measures which can be used are providing information in Braille, audiotape, computer disk formats; advertising through newsletters produced by disability groups; providing Teletypewriter (TTY) numbers for any hotline and advertising on Radio for the Print Handicapped (RPH).<sup>780</sup>

### **Recommendation 161 - People with a disability**

The AFP and NCA should seek advice from peak disability organisations in developing a comprehensive policy to meet their obligations under the Discrimination Disability Act particularly in relation to recruitment, conditions of employment and provision of services.

### **Recommendation 162**

Any policy on the response to people with a disability should consider the definition of disability provided for under the DDA.

### **Recommendation 163**

The AFP, NCA and NIIC should consult with peak disability organisations and the Disability Discrimination Act Legal Advocacy Services on appropriate methods of providing information and education about the complaints procedures to people with a disability.

# **Appendix A: Participants**

## **The Commission**

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purposes of these references comprises the following:

### ***President***

Alan Rose AO

### ***Deputy President***

Sue Tongue (to October 1995)

David Edwards PSM (from 13 December 1995)

### ***Members***

Chris Sidoti (to August 1995)

Michael Ryland

Kathryn Cronin (from 1 February 1996)

## **Officers**

### ***Team Leader***

Michael Barnett

### ***Legal Specialist***

David Kinley

### ***Law Reform Officers***

Lucinda Jones (to September 1995)

Annemaree McDonough (to October 1996)

### ***Research Assistants***

Annemaree McDonough (to September 1995)

Stephen Bird (to December 1995)

Peter O'Brien (from July 1996)

### ***Legal Intern***

Hanne Stig Andersen (to March 1996)

### ***Project Assistant***

Maureen Carter (to December 1995)

### ***Typesetting***

Anna Hayduk

## ***Library***

Joanna Longley *Librarian*

Emma Joneshart *Library Officer* (from April 1995 to September 1996)

Yasmin Catley *Library Officer* (from September 1996)

## **Consultants**

Mr David Allen, Justice Division, Human Rights & Equal Opportunity Commission

Mr Bill Antill, Assistant Commissioner, Australian Federal Police (Qld) (to November 1995)

Professor John Braithwaite, Division of Philosophy and Law, Australian National University

Mr Brian Dargan, Director, Law Reform, National Crime Authority (from February 1996)

Dr Sandra Egger, Associate Professor, Faculty of Law, The University of New South Wales

The Hon Justice Michael Foster, President, Federal Police Disciplinary Tribunal

Mr Ian Freckleton, Barrister

Mr Garry Fulton, National Treasurer, Australian Federal Police Association (from June 1996)

Dr Adam Graycar, Director, Australian Institute of Criminology

Mr Tom Howe, Deputy Director, Australian Government Solicitor (ACT)

Mr Crispin Hull, Deputy Editor, Canberra Times

Mr Mark Ierace, Barrister, Office of the Commonwealth Director of Public Prosecutions

Mr John Ireland, Director, Executive Office, Australian Federal Police (from November 1996)

Ms Jeannine Jacobson, Director, Policy, National Crime Authority (to February 1996)

Mr Ron McLeod, Inspector-General of Intelligence & Security

Ms Vasiliki Nihas, Consultant, Access and Equity and Social Justice

Mr Terry O'Gorman, Vice President, Queensland Council for Civil Liberties

Ms Sue Pidgeon, Senior Assistant Ombudsman, Commonwealth & Defence Force Ombudsman

Mr Daryl Smeaton, Executive Member, Commonwealth Law Enforcement Board

Ms Julie Stubbs, Senior Lecturer in Criminology, University of Sydney

Mr Sid Tilmouth QC, Chairman, Criminal Law Section, Law Council of South Australia

Mr Garry Wills, Federal Agent, Australian Federal Police

## ***AFP liaison and policy contact***

Mr Patrick Leonard, Federal Agent, Legislation Review, Australian Federal

## Appendix B: Abbreviations

AAT	Administrative Appeals Tribunal
ABCI	Australian Bureau of Criminal Intelligence
ACT	Australian Capital Territory
ADR	Alternative Dispute Resolution
AFP	Australian Federal Police
AFP Act	<i>Australian Federal Police Act 1979 (Cth)</i>
AFPA	Australian Federal Police Association
AFP Reg	Australian Federal Police Regulations
AGS	Australian Government Solicitor
AIC	Australian Institute of Criminology
AIDEX	Australian International Defence Exhibition
ALRC 1	<i>ALRC 1 Complaints Against Police</i>
ALRC 9	<i>ALRC 9 Complaints Against Police (Supplementary Report)</i>
ALS	Aboriginal Legal Service
ANAO	Australian National Audit Office
APS	Australian Public Service
ARC	Administration Review Council
ART	Administration Review Tribunal
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATSIC	Aboriginal and Torres Strait Islander Commission
CAPV	Coalition Against Police Violence
CBD	Central Business District
CID	Criminal Investigation Division
CJC	Criminal Justice Commission (Qld)
CLC	Community Legal Centres
CLEB	Commonwealth Law Enforcement Board
Complaints Act	<i>Complaints (Australian Federal Police) Act 1981 (Cth)</i>
CPA	Canberra Police Association
CPIB	Corrupt Practices Investigation Bureau (Singapore)
CPS	Crown Prosecution Service (England)
CROC	Convention on the Rights of the Child
CSB Act	<i>Crimes (Superannuation Benefits) Act 1988 (Cth)</i>
DDA	<i>Disability Discrimination Act 1992 Cth</i>
DEST	Department of Environment, Sport and Territories
DFAT	Department of Foreign Affairs and Trade
DPP	Director of Public Prosecutions
DVCS	Domestic Violence Crisis Service Inc
EEO	Equal Employment Opportunity
FNB	Federal Narcotics Bureau
FOI	Freedom of information
FPDT	Federal Police Disciplinary Tribunal
IAB	Internal Audit Branch (ISA)
IACOLE	International Association for Civilian Oversight of Law Enforcement
IAU	Internal Affairs Unit (WA)
ICAC	Independent Commission Against Corruption (NSW)
ICAC (HK)	Independent Commission Against Corruption (Hong Kong)
ICCPR	International Covenant on Civil and Political Rights
IGC	Inter-Governmental Committee on the NCA
IGIS	Inspector-General of Intelligence and Security
IIB	Internal Investigation Branch (SA)
IID	Internal Investigation Division of the AFP
IIU	Internal Investigation Unit (Tas)
IR	Informal Resolution
IRC	Industrial Relations Commission

ISA	Internal Security and Audit (AFP)
MOU	Memorandum of Understanding
MPRA	Merit Protection Review Agency
NADRAC	National Alternative Dispute Resolution Advisory Council
NCA	National Crime Authority
NCA Act	<i>National Crime Authority Act 1984 (Cth)</i>
NIIC	National Integrity and Investigations Commission
NPEAB	National Police Ethnic Advisory Bureau
NSW	New South Wales
NSWCC	New South Wales Crime Commission
NT	Northern Territory
NYARS	National Youth Affairs Research Scheme
NZ	New Zealand
OMD	Official Misconduct Division (CJC)
OPR	Office of Professional Responsibility
PACE Act	<i>Police and Criminal Evidence Act 1984 (UK)</i>
PCA (Eng)	Police Complaints Authority, England
PCA (SA)	Police Complaints Authority, South Australia
PCA (Vic)	Police Complaints Authority, Victoria
PCAI (WA)	Parliamentary Commissioner for Administrative Investigations
PCB	Police Complaints Board, Republic of Ireland
PCPAG	Police Commissioner's Policy Advisory Group
PCS	Public Service Commissioner
PIC	Police Integrity Commission
PJC	Parliamentary Joint Committee
PRB	Police Review Board, Cleveland, Ohio
PRC	Police Review Commission
Qld	Queensland
QPS	Queensland Police Service
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RCMP	Royal Canadian Mounted Police
SA	South Australia
SAT	Security Appeals Tribunal
SCOCCI	Standing Committee on Organised Crime and Criminal Intelligence
SSCFPA	Senate Standing Committee on Finance and Public Administration
Tas	Tasmania
TIS	Translating and Interpreting Service
UK	United Kingdom
UN	United Nations
US	United States
USSR	United Soviet Socialist Republic
Vic	Victoria
VIPs	Very Important Persons
WA	Western Australia

# Appendix C: List of submissions

## Submissions prior to issues paper

ACT Council of Social Service Inc	<i>Submission 22</i>
Attorney-General's Department, Criminal Law Division	<i>Submission 3</i>
Australian Federal Police	<i>Submission 29</i>
Bates M	<i>Submission 19</i>
Bates BC, Police Commissioner (NT)	<i>Submission 13</i>
Bruce GL	<i>Submission 4</i>
Butterfield Dr AW	<i>Submission 10</i>
Canberra Police Association	<i>Submission 26</i>
Combined Women's Refuge Group	<i>Submission 24</i>
Commonwealth Ombudsman	<i>Submission 17</i>
Confidential	<i>Submission 1</i>
Confidential	<i>Submission 7</i>
Confidential	<i>Submission 18</i>
Confidential	<i>Submission 28</i>
Confidential	<i>Submission 15</i>
Confidential	<i>Submission 27</i>
Department of the Environment, Sport & Territories, Territories Office	<i>Submission 25</i>
Department of Employment, Education and Training	<i>Submission 8</i>
Department of Immigration & Ethnic Affairs	<i>Submission 11</i>
Department of Social Security	<i>Submission 21</i>
ICAC (NSW)	<i>Submission 20</i>
ICAC (NSW)	<i>Submission 23</i>
Kirby The Hon M, President, Court of Appeal (NSW)	<i>Submission 6</i>
Law Society of South Australia, Administrative Law Committee	<i>Submission 9</i>
National Police Ethnic Advisory Bureau	<i>Submission 2</i>
O'Connor K, Privacy Commissioner	<i>Submission 16</i>
Office of the DPP (ACT)	<i>Submission 14</i>
Smeaton DP, Executive Member, Commonwealth Law Enforcement Board	<i>Submission 12</i>
Wells Dr D	<i>Submission 5</i>

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## **Appendix D: International obligations**

The international obligations mentioned in the terms of reference are as follows. The relevant provisions of each are summarised.

### **International Covenant on Civil and Political Rights (ICCPR)**

Australia signed this Covenant on 18 December 1972 and ratified it on 13 August 1980. The Covenant entered into force in Australia on 13 November 1980.<sup>781</sup>

The Covenant provides for protection of fundamental human rights including

- the right to self determination
- the right to an effective remedy where rights have been violated
- the right to life
- protection from torture or cruel, inhuman or degrading treatment or punishment
- the right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention
- all persons deprived of their liberty shall be treated humanely and with respect for the inherent dignity of the person
- accused juvenile persons shall be separated from adults and be brought as soon as possible for adjudication
- the right of movement and freedom to chose one's own residence
- equality before the courts and tribunals
- the right to a fair and public hearing by a competent, independent and impartial tribunal established by law
- the right to be tried without undue delay
- equality before the law and the entitlement without any discrimination to the equal protection of the law
- the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, origin, political or other, national or social origin, property, birth or other status.

### **Convention on the elimination of all forms of discrimination against women**

Australia signed this Convention on 17 July 1980 and ratified it on 28 July 1983. The Convention came into force in Australia on 27 August 1983.

Article 1 of the Convention provides that the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Article 2 provides that a party to the Convention condemns discrimination to women in all its forms, and agrees to pursue by all appropriate means and

without delay a policy of eliminating discrimination against women and to this end, undertakes (among other things)

- to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination
- to ensure that public authorities and institutions shall act in conformity with this obligation
- to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise
- to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women
- to repeal all national penal provisions which constitute discrimination against women.

Article 11 provides that parties to the Convention shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.

Article 15 provides that State Parties shall accord to women, in civil matters, legal capacity identical to that of men and the same opportunities to exercise that capacity. Article 15 also provides that parties shall accord to women equality with men before the law.

## **International convention on the elimination of all forms of racial discrimination**

Australia signed the Convention on 13 October 1966 and ratified it on 30 September 1975.<sup>782</sup> The Convention entered into force in Australia on 30 October 1975.<sup>783</sup>

Article 1 defines 'racial discrimination' as meaning any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms. Special measures taken for the sole purpose of securing adequate advance for a certain racial or ethnic groups or individuals shall not be deemed racial discrimination provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken had been achieved. Article 2 provides that parties to the Convention condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races and to this end

- to take effective measures to review governmental national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination.

Article 5 provides that the parties shall guarantee the right of everyone, without distinction as to race, colour, or national ethnic origin, to equality before the law. Article 6 provides that parties to the Convention shall ensure to everyone within the jurisdiction effective protection and remedies, through national tribunals and other state institutions, against any acts of racial discrimination which violate human rights and fundamental freedoms.

## **Convention against torture, cruel or inhuman or degrading treatment or punishment**

Australia signed this Convention on 10 December 1985 and ratified it on 8 August 1989. The Convention entered into force in Australia on 7 September 1989.<sup>784</sup>

This Convention provides a number of measures to prohibit torture, cruelty, inhuman or degrading treatment or punishment. Article 4, for example, provides that each State Party shall ensure that all acts of torture are offensive under its criminal law. Article 11 provides that each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment with a view preventing any cases of torture. Article 13 provides that each State Party shall ensure that any individual who alleges he (sic) has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his (sic) case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of a complaint or any evidence given.

Article 14 provides that each State Party shall ensure in its legal system that the victim of an act of torture can claim redress and has an enforceable right to fair and adequate compensation, including a means for a full rehabilitation as soon as possible.

## **Convention on the rights of the child (CROC)**

Australia signed this Convention on 22 August 1990 and ratified it on 17 December 1990. The Convention entered into force on 16 December 1991.

The Convention creates binding obligations in international law that are not automatically part of Australian domestic law. Article 1 provides that for the purposes of the Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is obtained earlier. Article 2 provides that State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 12(2) provides that a child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Article 16 provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Children have the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse while in the care of parents, legal guardians or any other person who has the care of the child. Under Article 23(2) the Convention recognises the right of the disabled child to special care and requires the parties to the Convention to encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance. Article 34 requires the parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse. Article 37 provides that

- no child shall be subjected to torture, cruel, inhuman or degrading treatment or punishment
- no child shall be deprived of his or her liberty unlawfully or arbitrarily
- the arrest, detention or imprisoning of a child shall be in conformity with the law and shall be used only as a means of last resort and for the shortest appropriate period of time
- every child deprived of liberty shall be treated with humanity and respect
- every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40 provides that there shall be recognition of the right of every child alleged, accused of, or recognised as having infringed penal law to be treated in a manner consistent with the promotion of child's sense of dignity and worth.

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- 1 Complaints Against Police ALRC 1 & Complaints Against Police: Supplementary Report ALRC 9.
  - 2 The NCA's mixed workforce is discussed in ch 4. It comprises the Chairperson, members, persons employed under the Australian Public Service Act 1922 (Cth), consultants, seconded personnel, legal counsel and members of joint task forces.
  - 3 The first attempt in 1984 would have conferred jurisdiction on the Commonwealth Ombudsman but was rejected by a Senate Committee on the ground that the Ombudsman may face difficulties in dealing with organised crime. The second attempt in 1992 was part of a wider amending Bill to the NCA Act and would have conferred jurisdiction on the Inspector-General of Intelligence and Security but the Bill was not proceeded with on grounds unrelated to this issue.
  - 4 ALRC IP 18 Speaking for ourselves. Children and the legal process March 1996.
  - 5 Platypus. The Journal of the Australian Federal Police No 48 September 1995, 6-7.
  - 6 Royal Commission into Aboriginal Deaths in Custody National Report Volume 4 AGPS Canberra 1991 ch 29.
  - 7 The Royal Commission Government Response Monitoring Unit, Aboriginal and Torres Strait Islander Commission Implementation of Commonwealth Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody First Annual Report 1992-93 Vol 1 and 2. See also Commonwealth of Australia Aboriginal Deaths in Custody. Overview of the Response by Governments to the Royal Commission AGPS 1992.
  - 8 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Justice under scrutiny. Report of the Inquiry into the implementation by Governments of the recommendations of the Royal Commission into Aboriginal Deaths in Custody AGPS November 1994.
  - 9 Human Rights and Equal Opportunity Commission Racist Violence. Report of the National Inquiry into Racist Violence in Australia AGPS Canberra 1991.
  - 10 Commonwealth Government Printer Canberra November 1991.
  - 11 Access to Justice Advisory Committee Access to justice, an action plan Commonwealth of Australia 1994.

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- 12 Australia. Parliament. Senate Standing Committee on Finance and Public Administration Review of the Office of the Commonwealth Ombudsman AGPS Canberra December 1991.
- 13 Report of a Commission of Inquiry pursuant to Orders in Council Brisbane 1989.
- 14 Queensland Police Service Review Report on the Review of the Queensland Police Service. Prepared for the Honourable Russell Cooper MLA Minister for Police and Corrective Services and Minister for Racing Brisbane July 1996.
- 15 Parliament of Western Australia. Select Committee on the Western Australian Police Service. Interim Report, Terms of reference 3 Parliament House June 1996.
- 16 Parliament of New South Wales. The Joint Committee on the Office of the Ombudsman Inquiry upon the Role of the Ombudsman in Investigating Complaints Against Police April 1992.
- 17 NSW Ombudsman NSW Police Complaints System December 1995.
- 18 Royal Commission into the NSW Police Service Interim Report Sydney 1996.
- 19 Royal Commission into the NSW Police Service Interim Report. Immediate measures for the reform of the Police Service of New South Wales Sydney November 1996.
- 20 For a discussion of Project Guardian see 'Ethics and Ethos' Police Life August 1996, 4-6.
- 21 M Mollen Commission to investigate allegations of police corruption and the anti-corruption procedures of the police department New York 1994.
- 22 IP ch 6.
- 23 IP ch 7.
- 24 M Findlay 'The Ambiguity of Accountability: Deaths in Custody and the Regulation of Police Power' [1994] *Current Issues in Criminal Justice* 234, 235.
- 25 J Braithwaite 'Good and Bad Police Services and How to Pick Them' in H Eijkman and P Moir ed *Policing Australia: Old Issues, New Perspectives* Macmillan Co of Australia South Melbourne 1992, 13.
- 26 Adopted by the United Nations General Assembly on 17 September 1979.
- 27 See ch 8.
- 28 C Shearing *Organisational Police Deviance. Its Structure and Control* Butterworths Toronto 1981, 1.
- 29 *Submission 120*.
- 30 Ombudsman *Annual Report 1995-96*, 178.
- 31 B Etter 'Mastering innovation and change in police agencies' in B Etter & M Palmer eds *Police Leadership in Australasia* 281.
- 32 *Submission 134*.
- 33 B Wigan & P Roger 'Intelligence, The Servant of Strategy: Empowering crime prevention and control' *Themis The Journal for Justice Professionals* Vol 1 No 1 March 1996 16-21 19.
- 34 *ibid*.
- 35 In relation to the AFP see the AFP Act s 26E.
- 36 Access to Justice Report 313-316.
- 37 *Submission 124*.
- 38 *Submission 129*.
- 39 *Submission 120*.
- 40 A Goldsmith 'External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures' in A Goldsmith ed *Complaints Against the Police. The Trend to External Review* Clarendon Press Oxford 1991 13-16, 14.
- 41 *id* 54-5.
- 42 See ch 13.
- 43 Lateral entry means there is greater movement across police forces by way of transfer at middle and senior levels and greater competition from applicants who have had careers external to the police forces.
- 44 Most notably, Fitzgerald Report 1989 Brisbane 148-149, Wood J, NSW Royal Commission into the NSW Police Service Transcript, 4 October 1995, R Fox & I Mathews 'Drugs Policy: Fact, Fiction and the Future' 1992, 143-145.
- 45 In particular, Parliamentary Joint Committee on the National Crime Authority *Drugs Crime and Society* (The Cleeland Commission) 1989 AGPS 86-87.
- 46 Fitzgerald Report 148.
- 47 *id* 196.
- 48 Wood J *NSW Royal Commission into the NSW Police Service* Transcript 4 October 1995.
- 49 *ibid*.
- 50 New South Wales Police Service *Submission to the Royal Commission into the NSW Police Service* 49.
- 51 Police Board of New South Wales *Submission to the Royal Commission into the NSW Police Service* November 1995, 5-6.
- 52 UTS Community Law Centre *Submission 125*.
- 53 J White MP (Tasmania) also argued that drug laws had to be changed if police corruption was to be significantly reduced (the Hobart Consultations February 1996).
- 54 Victoria. Premier's Drug Advisory Council *Drugs and our community* Melbourne 1996.
- 55 AFP members are sworn in as and become members of the Norfolk Island Police Force under the *Norfolk Island Police Act 1931 (NI)* on taking up duty on Norfolk Island.
- 56 s 4.
- 57 *ibid*.
- 58 AFP Act s 6(2), (3) and s 27.
- 59 General Order 6.
- 60 AFP *Annual Report 1995-96*, 44.
- 61 *ibid*.
- 62 Ombudsman *Annual Report 1995-96*, 119-120.
- 63 AFP *Annual Report 1995-96*, 45.
- 64 s 6A. An AFP appointee is a member of the AFP or a staff member of the AFP or a special member of the AFP appointed under s 27.
- 65 s 6 and also see s 22.
- 66 AFP *Annual Report 1995-96*, 44.
- 67 see Part II Division 3 particularly s 14.
- 68 s 14.
- 69 s 7.
- 70 s 16(4).
- 71 s 10.
- 72 s 8.

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73 The Act allows a maximum of three years: s 17.  
74 AFP *Submission 29*. S 16(1) Complaints Act requires the Commissioner to ensure that at all times there are a minimum of 2 Federal police Officers serving in the IID.  
75 s 16(2).  
76 Ombudsman *Annual Report 1995-96* AGPS Canberra 1995, 120.  
77 s 23(1)(a).  
78 s 46.  
79 s 36.  
80 s 21A.  
81 ISA was until recently the Internal Security and Audit Division (ISAD) but it is no longer a division under the new organisational structure of the AFP. Similarly the IID is also now referred to as II. However, the Complaints Act has not been amended to reflect that change so the Commission still refers to the stipulated statutory title of IID.  
82 Fitzgerald report Brisbane 1989.  
83 AFP *Submission 29*.  
84 *ibid.*  
85 see s 8.  
86 Ombudsman *Annual Report 1994-5*, 157.  
87 *id* 158.  
88 *ibid.*  
89 Information provided to the Commission by the Commonwealth Ombudsman.  
90 That is, from the receipt of the complaint by the IID until the file is first referred to the Ombudsman for review purposes.  
91 Calculated from when the IID refers a complaint for review to the Ombudsman and concluding when the Ombudsman advises the AFP that the matter is considered finalised by her Office.  
92 See Ontario Ombudsman, *Public Opinion Survey: Winter 1991* Ontario 1991, which found that disadvantaged groups were less aware than the community generally of the existence of the Ombudsman and less willing to use the Office if aware of it: referred to in SSCFPA *Review of the Office of the Commonwealth Ombudsman* AGPS Canberra 1991, para 5.77; D Brown *The Police Complaints Procedure: A Survey of Complainants' Views* Home Office Research Study No 93 HMSO London 1987.  
93 *ibid.*  
94 Administrative Review Council *Access to Administrative Review by Members of Australia's Ethnic Communities* Report No 34 AGPS Canberra 1991.  
95 RCIADIC: *National Report: Volume 4* AFPS Canberra 1991, 29.  
96 C Alder, I O'Connor, K Warner & R White *Perceptions of the Treatment of Juveniles in the Legal System* National Youth Affairs Research Scheme National Clearinghouse for Youth Studies Hobart 1992.  
97 See chapter 16.  
98 Complaints Act s 6, 7, 23 and s 25(5).  
99 s 35.  
100 s 7(3).  
101 s 46(1).  
102 s 24.  
103 s 36, 48.  
104 s 37.  
105 s 6(3).  
106 Confidential *Submission 40*; G Ward *Submission 57*.  
107 M Stevenson Canberra consultation March 1996.  
108 B Alcroft Canberra consultation March 1996.  
109 S Sheehan *Submission 99*.  
110 J Brookes Brisbane consultation March 1996.  
111 Comment made at Norfolk Island consultation March 1996.  
112 R Hancock *Submission 65*.  
113 S Stergiou Canberra consultation March 1996.  
114 K Henderson *Submission 64*.  
115 Comment made at public meeting Norfolk Island and Jervis Bay February 1996  
116 eg D Evans *Submission 61*; Department of the Environment, Sport and Territories *Submission 52*.  
117 B Alcroft Canberra consultation March 1996.  
118 *Submission 104*.  
119 J Saunders *Submission 104*.  
120 Meeting with AFP Officers Western Australia consultation March 1996.  
121 AFP general Muster consultation Canberra March 1996.  
122 AFP Officers consultation Jervis Bay February 1996.  
123 Comment made at AFP Officers consultation Adelaide March 1996.  
124 AFP General Muster Eastern Region Headquarters consultation Sydney December 1995.  
125 Meeting with AFP members Eastern Region December 1995; AFP General Muster Adelaide March 1996.  
126 Mr L Sullivan President of the ACT Council for Civil Liberties Consultation Canberra March 1996.  
127 AFP General Muster Perth March 1996.  
128 Meeting with AFP Officers Western Australia consultation March 1996.  
129 Comment made by an AFP Officer at the Brisbane consultation March 1996.  
130 eg ACT General Muster March 1996.  
131 Comment made at consultation with the AFP General Muster Eastern Regional Headquarters December 1996.  
132 AFP General Muster Western Australia March 1996.  
133 AFP General Muster Consultation Perth March 1996.  
134 D Pearce 'The Commonwealth Ombudsman: The Right Office in the Wrong Place ' Speech given at the Conference of Public Law Canberra August 31 1996.  
135 *Submission 134*.  
136 *Submission 106*.  
137 Ombudsman *Submission 106*.  
138 Ombudsman *Annual Report 1995-96*, 178.

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139 See ch 7.  
140 Ombudsman *Annual Report 1995-96*, 120.  
141 *Submission 105*.  
142 R Campbell 'Ombudsman sees no virtue in law reformer's plan' *Canberra Times* 26 July 1996, 11; S Dunlevy 'Federal Police face new scrutiny' *The Daily Telegraph* 18 July 1996, 2; S Dunlevy 'Ombudsman to step up police checks' *The Daily Telegraph* 19 July 1996, 29; C Merritt 'Ombudsman rejects cutback' *Australian Financial Review* 24 July 1996; A Rose, ALRC President, 'Radical rethink needed on AFP complaints handling' *Canberra Times* 1 August 1996, 10; R Evans 'Ombudsman under fire' *Australian Lawyer* 31 August 1996, 8.  
143 *Submission 124*.  
144 *Submission 105*.  
145 IACOLE *Submission 54*.  
146 Justice Michael Kirby *Submission 6*.  
147 A Goldsmith 'External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures' in A Goldsmith ed *Complaints Against the Police. The Trend to External Review* Clarendon Press Oxford 1991, 40.  
148 *Police Service Administration Act 1990* s 1(4).  
149 NSW Royal Commission Interim Report 91-2.  
150 id 89-90.  
151 DRP para 3.55-62.  
152 The figure of 70% is an estimate based on an effective and increased use of informal resolution; see ch 8, paras 8.17, 8.139 and ch 12, paras 12.2-16.  
153 National Crime Authority Act 1984 (Cth) s 37.  
154 s 47.  
155 s 47.  
156 s 49 and 58.  
157 According to the NCA the memorandum with South Australia is in draft form and is likely to be formally entered into soon.  
158 s 50.  
159 s 11(1)(c).  
160 s 4.  
161 Information provided to the Commission by the NCA.  
162 NCA Annual Report 1995-96, 62-64.  
163 s 4.  
164 s 51.  
165 Parliament of the Commonwealth of Australia Who is to Guard the Guards? An evaluation of the National Crime Authority. Report by the Parliamentary Joint Committee on the National Crime Authority November 1991, 131-2.  
166 *ibid*.  
167 Parliament of the Commonwealth of Australia. 37th Parliament. A report of the Parliamentary Joint Committee on the National Crime Authority October 1994.  
168 *Submission 120*.  
169 Access to Justice Advisory Committee Access to Justice, an action plan Canberra 1994, ch 12.  
170 Channel 9 Sunday program 22 September 1996, 'A case of rough justice' *The Canberra Times* 7 September 1996.  
171 Confidential *Submission 131*.  
172 The Parliament of the Commonwealth of Australia. Report of the Parliamentary Joint Committee on the National Crime Authority Operation Ark October 1990. Parliamentary Paper No 430 of 1990.  
173 *Submission 31*.  
174 *Submission 91*.  
175 See ch 16.  
176 NCA *Submission 91* and Attorney-General's Department *Submission 97*.  
177 *Submission 91*.  
178 *Submission 66*.  
179 South Australian Police *Submission 117*, Victoria Police *Submission 129*.  
180 *Submission 111*.  
181 *Submission 53*.  
182 Mr Eisman also argued that the IGIS staff and resources were too limited to investigate complaints concerning the AFP or the NCA. Sydney consultation March 1996.  
183 Australian Council for Civil Liberties *Submission 53*.  
184 *Submission 84*.  
185 Comments made at a meeting with NCA staff at Perth consultation March 1996.  
186 Comments made at a meeting with NCA staff at Perth consultation March 1996.  
187 Comments made at a meeting with NCA staff at Perth consultation March 1996.  
188 Confidential consultation.  
189 Comments made at NCA staff consultation Adelaide March 1996.  
190 Comments made at NCA staff consultation Adelaide March 1996.  
191 Comments made at NCA staff consultation Adelaide March 1996.  
192 Letter to the Commission 25 September 1996.  
193 R N Mcleod Inspector-General of Intelligence and Security *Submission 10*.  
194 *Submission 120*.  
195 A Wainwright, PCA South Australia consultation March 1996.  
196 SCOCCL is designed to enhance the strategic role and effectiveness of the NCA with State and Territory law enforcement systems. The funding arrangement is that the Commonwealth through the NCA will pay for all establishment costs and annual recurrent costs to the approximate value of \$100 000 per annum and the States and Territories will contribute \$200 000 to be contributed by them in proportion to their respective populations as at 1 July each year.  
197 *Submission 120*.  
198 *Submission 120* and letter from the PJC to the Commission 25 September 1996.  
199 *Kish v Taylor* (1911) KB 625, 633-634; *R v Hulme* (1870) IR 5 QB 377.  
200 *Submission 120*.  
201 *Submission 129*.

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202 J Saunders *Submission 104*.  
203 NSW Royal Commission into Police Interim Report para 5.48.  
204 J Saunders *Submission 104*.  
205 The Fitzgerald Inquiry investigators had access to federal tax records.  
206 The Exposure Draft of the NSW Police Corruption Commission uses this distinction between 'managing' and 'supervising'.  
207 See ch 7.  
208 This mirrors cl 124 of the Exposure Draft of the NSW Police Corruption Bill 1996.  
209 ALRC 35 *Contempt Part VA*.  
210 J Saunders *Submission 104*.  
211 *R v Miller* (unreported) NSW Supreme Court of Criminal Appeal, 3 May 1996 Mahoney P, McInerney, Hulme JJ per Mahoney P at 4 where evidence emerged from a statement by police officers at the Royal Commission into the NSW Police that police officers had perjured themselves and suppressed evidence. This evidence gave rise to an review of conviction under Part 13A of the *Crimes Act 1900* (NSW).  
212 Part 13A (s 474A-74P).  
213 s 70.  
214 NSW Royal Commission into the Police Interim Report 95.  
215 *Submission 126*.  
216 *Submission 120*.  
217 Letter from the PJC to the Commission 25 September 1996.  
218 See ch 7.  
219 *Submission 124*.  
220 *Submission 129*.  
221 *Police Service Administration Act 1990* (Qld) s 7.  
222 Letter from the PJC to the Commission 25 September 1996.  
223 Attorney General's Department *Submission 126*, NCA *Submission 120*.  
224 *Submission 126*.  
225 *Submission 124*.  
226 *Submission 129*.  
227 *Submission 120*.  
228 Butterworths *Federal Criminal Law Vol 1* para 1-205-1-500, 2025-2039.  
229 N Chrisakis *Submission 100*.  
230 s 82-92.  
231 Ombudsman *Annual Report 1995-96*, 130-131.  
232 *ibid*.  
233 S Bronitt and D Kinley 'Undercover policing: detection or deception?' in H Selby ed *Tomorrow's Law* Federation Press 1995, 8.  
234 Total expenditure in connection with the execution of warrants for telecommunications interception for 1994 totalled \$13 054 970 nationally. The AFP totalled \$186 177 and NCA totalled \$1 810 000. Source: *Telecommunications (Intercept) Act 1979* (Cth) Report for the year ending 30 June 1994 AGPS Canberra 1995, 31.  
235 View expressed by Victorian Ombudsman consultation Melbourne March 1996.  
236 NSW Royal Commission into the Police *Interim Report 99*.  
237 See para 7.86.  
238 A copy of the guidelines was given to the Commission by the AFP.  
239 *Submission 126*.  
240 *Submission 124*.  
241 Quoted by C Lewis 'Independent External Civilian Review of Police Conduct' in K Bryett and C Lewis eds *Un-Peeling tradition: Contemporary Policing MacMillan Education Australia Pty Ltd Melbourne* 103.  
242 *Submission 120*.  
243 *Submission 129*.  
244 *Submission 106*.  
245 *Submission 128*.  
246 *Submission 105*.  
247 The South Australian Police Complaints Authority Annual report (p 58) records that the Authority has adopted these time limits in relation to complaints against the South Australian Police.  
248 These periods have been agreed upon by the South Australian Police Complaints Authority and the South Australian Police — see PCA Annual Report 73.  
249 Victoria Police *Submission 129*, Ombudsman *Submission 106*.  
250 *Submission 124*.  
251 *Submission 129*.  
252 As to police 'professionalisation' and professionalism see N Uildriks & H van Mastrigt *Policing Police Violence* Kluwer Law and Taxation Publishers Deventer The Netherlands 1991, 205.  
253 I Freckelton & H Selby 'Piercing the Blue Veil: An Assessment of External Review of Police' in D Chappell & P Wilson *Australian Policing Contemporary Issues* Butterworths North Ryde 1989, 15, 28.  
254 D Meadus *Complaints Against Police Officers in the Commonwealth of Australia* study Winston Churchill Memorial Trust 1988, 55. See the discussion of the motives for police to discredit the complainant and concoct their responses in K Russell *Complaints Against Police: A Sociological View* 2nd ed Milltak Leicester 1978, 62-3.  
255 The problems of police corroboration of each others version of events, and the common lack of independent witnesses, is referred to extensively in the literature, see for example N Uildriks & H van Mastrigt *Policing Police Violence* Kluwer Law and Taxation Publishers Deventer The Netherlands 1991, 110-111.  
256 *Submission 124*.  
257 *Submission 82*.  
258 *Submission 84*.  
259 *Submission 83*.  
260 N Chrisakis *Submission 100*.  
261 *Submission 134*.  
262 *Submission 129*.  
263 *Submission 124*.  
264 *Submission 120*.

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265 Submission 106.  
266 Submission 105.  
267 Submission 128.  
268 Submission 133.  
269 Submission 124.  
270 Submission 133.  
271 Submission 106.  
272 Senate Standing Committee on Finance and Public Administration report para 5.54.  
273 id para 5.54-70.  
274 id para 5.48.  
275 D Pearce 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' Speech given at the Conference of Public Law August 31 1996.  
276 Submission 134.  
277 Senior AFP police Melbourne consultation March 1996.  
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281 NSW Royal Commission into the Police Service Interim Report 65.  
282 M Gissiner President IACOLE letter to the Commission 27 February 1996.  
283 NSW Ombudsman submission to the NSW Royal Commission into the Police Service 23/11/95, Doc1761203-564, quoted in the NSW Royal Commission into the Police Service Interim Report at para 5.2.  
284 Letter to the Commission 24 September 1996.  
285 Consultation with the CJC March 1996.  
286 Submission 104.  
287 Consultation with the CJC September 1996.  
288 Submission 106.  
289 Letter from G Crooke QC Senior Counsel Assisting, Royal Commission into the NSW Police Service to the Commission, September 1996.  
290 NSW Ombudsman Annual Report 1995-96, 21.  
291 Submission 105.  
292 Consultation with the CJC September 1996.  
293 NSW Police Board submission to the NSW Royal Commission into the Police Service November 1995, 9.  
294 Senator BC Cooney, Senator for Victoria Submission 130.  
295 The Commission has settled on 95% because the Ombudsman would still have a small role to play in forwarding on complaints that are lodged with her offices -see ch 15. The figure \$590 000 is derived from the average yearly expenditure by the Ombudsman over the last three years ie 1992-3 \$618 000, 1993-4 \$769 000 and 1994-5 \$475 000.  
296 For the AFP see ch 3 and for the NCA ch 5.  
297 See ch 4 and 10.  
298 See ch 5 and 10.  
299 Letter to the Commission 1 October 1996.  
300 Submission 126.  
301 Submission 124.  
302 Submission 106.  
303 NSW Police Service Annual Report 1994-95 Appendices.  
304 Letter to the Commission 5 June 1996.  
305 Ombudsman for the Northern Territory of Australia Annual Report 1994-95, 27.  
306 ibid.  
307 Consultation with R Green Tasmanian Ombudsman February 1996.  
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309 Submission 106.  
310 Advice from S Westmacott Investigator, PCA 28 August 1996.  
311 Memorandum from Mr McKechnie QC, Director of Public Prosecutions, to the Premier, the Attorney-General and the Minister for Police 23 March 1994. Quoted by the WA Select Committee report 79-82.  
312 NCA Submission 120.  
313 The FNB was disbanded in November 1979 and its responsibility for enforcing Commonwealth laws against imported drugs elsewhere than at the Customs barrier was vested in the AFP. Staff of the FNB were transferred to the Office of the AFP on 7 November 1979 and some were appointed to the AFP in 1980.  
314 S Corby and R Campbell 'Officers took bribes: ex-sex worker' Canberra Times 8 August 1996, 3.  
315 Submission 104.  
316 Submission 82.  
317 J Skolnick & D Bayley *The New Blue Line: Police Innovation in Six American Cities* Free Press New York 1986 quoted by B Etter 'Mastering Innovation and Change in Police Agencies' 292.  
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319 G Masterman 'External Review: The NSW Experience' in I Freckelton and H Selby eds *Police in Our Society* Butterworths Sydney 1988, 205.  
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321 Submission 134.  
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323 J Kleinig 'Teaching and Learning Police Ethics: Competing and Complementary Approaches' *Journal of Criminal Justice* Vol 18 Pergamon Press 1990, 10.  
324 I Oliver *Police, Government and Accountability* Macmillan Press Hampshire 1987, 3.  
325 Sir Robert Peel's *Principles of Policing* 1829 quoted by J Munday 'You Can Run, But You Can't Hide - Dealing with the Media for Chief Executives' in B Etter & M Palmer eds *Police Leadership in Australasia* 264.  
326 Joint Committee on the National Crime Authority Hearing Law Reform Commission proposals for handling complaints against the NCA and AFP Canberra Monday 16 September 1996, 2.

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328 M Maguire & C Corbett A study of the Police Complaints System HMSO London 1991, 58.

329 id 191.

330 id 55.

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332 P Hewitt National Council for Civil Liberties A Fair Cop - Reforming the Police Complaints Procedure Jupiter Press Ltd Great Britain 1982.

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354 C Rivett Submission 63.

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419 *Submission 120.*  
420 Cth Ombudsman *Submission 17.*  
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434 *R v White: Ex parte Byrnes* (1963) 109 CLR 665.  
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447 See Health Insurance Commission decisions under *Health Insurance Act 1973* eg review of decision of the Minister after internal review in respect of a qualification held by a person.  
448 Merit Protection and Review Agency *Submission 67*; Law Council of Australia ACT *Submission 84*; Parliamentary Commissioner for Administrative Investigations (WA) *Submission 33*.  
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463 The Security Appeals Division was created by the *Law and Justice Legislation Amendment Act (No 1) 1996* (Cth) which abolished the Security Appeals Tribunal and transferred those functions to the new division of the AAT.  
464 *Submission 120*.  
465 *Submission 120*.  
466 *Submission 111*.  
467 *Submission 108*.  
468 *Submission 117*.  
469 *Submission 129*.  
470 Confidential consultation.  
471 *Submission 120*.  
472 *Submission 129*.  
473 AAT *Submission 132*, Attorney-General's Department *Submission 126*.  
474 Complaints AFP Regulations reg 9.  
475 (1938) 60 CLR 336, 361.  
476 id 362.  
477 *Re Kirby and Collector of Customs* (1989) 20 ALD 369, 377. In that case the AAT said that it applies the approach adopted in *Briginshaw v Briginshaw* that reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.  
478 Parliamentary Commissioner for Administrative Investigations WA *Submission*; Commonwealth Ombudsman *Submission 76*; Law Council of Australia *Submission 84*; Attorney-General's Department *Submission 85*; Victoria Police *Submission 129*; NCA *Submission 120*.  
479 *Submission 50*.  
480 *Submission 52*.  
481 Comment made at AFP General Muster consultation Adelaide March 1996; AFP General Muster Sydney December 1995.  
482 In the State disciplinary tribunals, the standards are as follows:  
Western Australia balance of probabilities  
South Australia beyond reasonable doubt  
Victoria balance of probabilities  
Tasmania balance of probabilities  
New South Wales balance of probabilities  
Queensland balance of probabilities  
Northern Territory balance of probabilities.  
483 *Complaints Act* s 7(5)-(6).  
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491 *Submission 106*.  
492 *Submission 129*.  
493 *Complaints Act* s 83.  
494 *Submission 129*.  
495 *Submission 120*.  
496 *Administrative Appeals Tribunal Act 1975* (Cth) s 62.  
497 Section 60(3) of the AAT Act gives witnesses before the Tribunal the same immunities as witnesses before the High Court. The AAT has also held that no adverse conclusion should be drawn by the fact that a person declines to answer a question on the basis that to do so may be incriminating: *Dolan v Australian and Overseas Telecommunications Corp* (1993) 31 ALD 510.  
498 *Submission 124*.

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499 *Australian Security Intelligence Organization Act 1979* (Cth) s 69. This provision was repealed when the SAT was abolished and the Security Appeals Division of the AAT created by the *Law and Justice Legislation Amendment (No 1) Act 1995* (Cth).

500 *Submission 126.*

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502 *Submission 126.*

503 *Submission 120.*

504 *Submission 135.*

505 *Submission 126.*

506 *Complaints Act* s 74.

507 A person who fails to comply with such directions may be imprisoned for six months.

508 *Administrative Appeals Tribunal Act 1975* (Cth) s 35.

509 *Submission 129.*

510 *Submission 135.*

511 *Submission 120.*

512 *Complaints Act* s 75(6).

513 *AAT Act* s 27.

514 *Complaints Act* s 68.

515 T Howe, Deputy Director AGS (ACT).

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519 Complaints Regulations reg 7.

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522 *id* Recommendation 21.

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524 *Submission 129.*

525 *Submission 132.*

526 *Submission 120.*

527 *Submission 124.*

528 Consultation Canberra 24 August 1995.

529 *AAT Act* s 69.

530 Parliamentary Commissioner for Administrative Investigations WA *Submission 33*; Merit Protection and Review Agency *Submission 67*; Victorian Council for Civil Liberties *Submission 74*; The Law Council of Australia *Submission 84*.

531 *Submission 120.*

532 *Complaints Act* s 79.

533 s 80.

534 s 79(3).

535 *Submission 120.*

536 *Submission 135.*

537 *Submission 129.*

538 *Submission 132.*

539 *Submission 120.*

540 *Submission 76.*

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542 A Durbach 'Test Case Mediation - Privatising the Public Interest' (1995) *Australian Dispute Resolution Journal* 233.

543 Parliamentary Commissioner for Administrative Investigations WA *Submission 33*; Commonwealth Ombudsman *Submission 76*; Attorney-General's Department *Submission 85*.

544 *Submission 135.*

545 *Submission 135.*

546 *Submission 129.*

547 Parliamentary Commissioner for Administrative Investigations (WA) *Submission 33*.

548 Attorney-General's Department *Submission 85* who thought that although the fact conciliation had taken place should be recorded the question of whether the outcome should be recorded was a question for police management.

549 The Law Society of Western Australia *Submission 52*.

550 *Submission 76.*

551 *Submission 135.*

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559 (1984) 53 ALR 593, 597.

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561 *Submission 129.*

562 (Discipline) Regulation 22.

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567 *ibid.*

568 s 49.

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571 *ibid.*  
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587 *id* 162.  
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589 *id* 180.  
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593 s 37.  
594 s 38A.  
595 *Submission 129*.  
596 *Submission 132*.  
597 *Submission 129*.  
598 *Submission 16*.  
599 *Submission 129*.  
600 *Submission 23*.  
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603 *Submission 129*.  
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605 *ibid.*  
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607 *id* 11. See also J Hunt 'The Logic of Sexism Among Police' 1990 1(2) *Women and Criminal Justice* and D Carter, A Sapp and D Stephens *The State of Police Education Policy Direction for the 21st Century Police Executive Research Forum* Washington DC 1989.  
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617 *Submission 84* Law Council of Australia, *Submission 76* Commonwealth Ombudsman, *Submission 38* Legal Aid Office (ACT).  
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630 *Submission 120*.  
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638 Internal complaints (ie complaints made to an AFP appointee by another AFP appointee) are excluded by s 6(4).  
639 s 4.  
640 s 5(3). In s 3(3) action 'in relation to employment' is defined to include action 'with respect to the promotion, termination of appointment or discipline of, or the payment of remuneration to, AFP appointees'.  
641 AFP *Submission 24*, Attorney-General's Department *Submission 126*.  
642 Complaints Act s 24.  
643 *Submission 106*.  
644 National Police Ethnic Advisory Bureau *Submission 97*.  
645 *Submission 129*.  
646 eg Complaints Act s 5, 22.  
647 AFP Act s 3(1). Also see: s 6(2): 'The *members* of the Australian Federal Police are: (a) the Commissioner of Police; and (b) a Deputy Commissioner or the Deputy Commissioners of Police; and (c) senior executive commissioned police officers; and (d) other commissioned police officers; and (e) non-commissioned police officers.'; s 6(3) AFP Act: 'The *staff members* of the Australian Federal Police are senior executive officers, and other officers who are not police officers.'; s 27 AFP Act provides that *special members* may be appointed by the Commissioner of the AFP with such powers and duties as are specified in the instrument of appointment. [Italics supplied]  
648 Commonwealth Ombudsman *Submission 47*.  
649 s 23(1)(a).  
650 *Submission 129*.  
651 s 24.  
652 T O'Gorman has suggested that public interest groups should have standing to make a complaint: consultants' meeting 7 September 1995. See also ALRC Report 78 *Beyond the doorkeeper - standing to sue for public remedies*.  
653 Note *Police and Criminal Evidence Act* s 88 (UK) which expressly allows for complaints to be received and sent to the Police Complaints Authority by various bodies.  
654 Commonwealth Ombudsman *Submission 47*.  
655 *Submission 120*, *Submission 129* and *Submission 106*.  
656 s 5(1)(c).  
657 s 24(1)(d).  
658 Commonwealth Ombudsman *Submission 47*.  
659 This perception casts doubt on the effectiveness of the victimisation offence in Complaints Act s 88A.  
660 see generally A Goldsmith 'External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures' in A Goldsmith ed *Complaints Against the Police. The Trend to External Review* Clarendon Press Oxford 1991, 20.  
661 It should be noted that the incidence of anonymous complaints does not appear to be high. For example, research into complaints against police in New South Wales showed that less than 3% of complaints in 1990 and 1991 were anonymous: J Stubbs *Complaints Against Police In New South Wales* New South Wales Bureau of Crime Statistics and Research Attorney-General's Department Sydney 1992, 8-9.  
662 Section 24(1)(d) allows the Ombudsman to determine that a complaint not be investigated if in his/her opinion the investigation of the action is not warranted having regard to all the circumstances.  
663 AFP General Muster Western Australia March 1996; AFP officers Jervis Bay consultation February 1996.  
664 AFP General Muster Western Australia March 1996.  
665 AFP General Muster Western Australia March 1996.  
666 *Submission 124*.  
667 *Submission 129*.  
668 Instruction to IID 16 July 1996.  
669 Information provided by the AFP 18 November 1996.  
670 s 19. The penalty is 20 penalty units. It is also an offence to make a false statement to the Ombudsman: Ombudsman Act s 44 (20 penalty units).  
671 SSFCPA *Review of the Office of the Commonwealth Ombudsman* AGPS Canberra December 1991.  
672 *Police Administration Act 1978* (NT) s 150.  
673 *Criminal Justice Act 1989* (Qld) s 136.  
674 *Criminal Justice Act 1989* (Qld) s 137.  
675 *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA) s 49.  
676 DP Smeaton, Executive Member, Commonwealth Law Enforcement Board *Submission 12*.  
677 eg AFP general muster Eastern Region Sydney December 1996 ; meeting with AFP officers consultation Jervis Bay February 1996; Meeting with AFP officers general muster Adelaide March 1996.  
678 AFP General Muster Brisbane March 1996.  
679 AFP General Muster Consultation ACT March 1996; AFP General Muster Sydney December 1995.  
680 AFP Brisbane consultation March 1996.  
681 AFP General Muster Western Australia March 1996.  
682 The Working Party consisted of the AFP, the Commonwealth Ombudsman and the federal Attorney-General's Department.  
683 The Parliament of the Commonwealth of Australia. Report by the Senate Standing Committee on Legal and Constitutional Affairs *Complaints (Australian Federal Police) Amendment Bill 1994* Senate Printing Unit Parliament House 1994 Canberra 7-13.  
684 Parliamentary Commissioner for Administrative Investigations (WA) *Submission 18*.  
685 s 87.  
686 Ombudsman Act s 41.  
687 s 87(3A).  
688 *Submission 17*.  
689 *Submission 129*.  
690 *Public Interest Disclosure Act 1994* (ACT), *Whistleblowers Protection Act 1994* (QLD), *Protected Disclosures Act 1988* (NSW), *Whistleblowers Protection Act 1993* (SA), *Official Corruption Commission Act 1988* (WA).  
691 *Submission 95*.  
692 The Review of Commonwealth Criminal Law (the Gibbs Committee) was set up in 1987 and released its final report in December 1991. In the course of its review the Committee examined proposed reforms to the official secrecy laws and examined whistleblowing in this context. See the Review of Commonwealth Criminal Law *Final Report* December 1991 Parliamentary Paper No 371 of 1991.  
693 See report of the Commission of Inquiry into the Australian Secret Intelligence Service (Samuels' Commission) 1995.  
694 *Submission 51*.

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695 *Submission 126.*  
696 AFP *Submission 124*; Victoria Police *Submission 129.*  
697 *Submission 120.*  
698 Confidential consultation.  
699 The *Whistleblowers Protection Bill 1991 (Cth)* was introduced by Senator Valentine on 12 December 1991.  
700 Independent Commission Against Corruption *Corruption Matters* April/May 1996 No 2.  
701 AFP Act s 37.  
702 *Submission 124.*  
703 *Submission 129.*  
704 Commonwealth Attorney-General *Submission 126*, NCA *Submission 120.*  
705 s 88.  
706 *Submission 29.*  
707 *Submission 129.*  
708 *Submission 76.*  
709 *Submission 29.*  
710 *Submission 95.*  
711 *Submission 129.*  
712 AFP Act s 64B.  
713 NCA *Submission 120*; AFP *Submission 124*; Victoria Police *Submission 129*; Ombudsman *Submission 106.*  
714 Complaints Act s 5 (1).  
715 Complaints Act s 22 (3).  
716 s 22 (4).  
717 s 18.  
718 Complaints Regulations reg 4(1).  
719 s 43, Complaints Regulations reg 6.  
720 s 18(2).  
721 s 38(2).  
722 See Complaints Regulations reg 4(2), 5.  
723 Complaints Regulations reg 4(1)(b), 6(a)(ii).  
724 This observation was made in respect of the NSW complaints system, J Stubbs consultants' meeting 7 September 1995 and see J Stubbs *Complaints against the Police in New South Wales* NSW Bureau of Crime Statistics and Research Sydney 1992, 5-6.  
725 A Goldsmith ' External Review and Self-Regulation: Police Accountability and the Dialectic of Police Complaints Procedures' in A Goldsmith ed *Complaints Against the Police. The Trend to External Review* Clarendon Press Oxford 1991, 22.  
726 Information Privacy Principle 10 deals with limits on the use of personal information and provides that a record keeper who has records containing personal information obtained for a particular purpose shall not use the information obtained for other purposes unless the individuals involved have consented, it is authorised by law or it is necessary for enforcement of a criminal law or other law. Other situations where the information could be used are where the record keeper believes on reasonable grounds that the information is necessary to prevent or lessen a serious or imminent threat to the life or health of an individual or the purpose for which the information is used is directly related to the purpose for which the information was obtained.  
727 *Submission 106.*  
728 *Submission 106.*  
729 NCA *Submission 120*; Victoria Police *Submission 129.*  
730 *Submission 124.*  
731 A Goldsmith ' External Review and Self-Regulation: Police Accountability and the Dialectic of Police Complaints Procedures' in A Goldsmith ed *Complaints Against the Police. The Trend to External Review* Clarendon Press Oxford 1991, 22; M Maguire and C Corbett *A Study of the Police Complaints System* London: HMSO 1991, 19-21.  
732 *Submission 129.*  
733 Issues Paper para 9.8.  
734 *Submission 120.*  
735 *Submission 129.*  
736 see ch 3.  
737 AFP Act s 9.  
738 AFP Act s 8.  
739 However Part III of the Complaints Act which deals with the responsibilities of the Ombudsman is the portfolio responsibility of the Department of Prime Minister and Cabinet.  
740 Commonwealth Ombudsman *Submission 106*, ACT Attorney-General *Submission 122.*  
741 *Submission 124.*  
742 AFP Act s 8(1)(aa).  
743 These arrangements are entered into under the AFP Act s 8(1)(c).  
744 ALRC Report 69 (Part 1) *Equality before the law: equality for women* Appendix 3.  
745 *ibid.*  
746 House of Representatives Standing Committee on Legal and Constitutional Affairs. *Islands in the Sun. The Legal Regime of Australia's External Territories and the Jervis Bay Territory* AGPS Canberra 1991.  
747 *Submission 79.*  
748 House of Representatives Standing Committee on Legal and Constitutional Affairs. *Islands in the Sun. The Legal Regime of Australia's External Territories and the Jervis Bay Territory* AGPS Canberra 1991.  
749 The Cocos (Keeling) Islands have only one AFP appointee.  
750 *Submission 124.*  
751 *Submission 124.*  
752 Issues Paper paras 11.17-20.  
753 *Submission 106.*  
754 *Submission 107.*  
755 *Submission 124.*  
756 D Evans *Submission 113.*  
757 *Submission 129.*  
758 *Submission 120.*

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759 Dalton Morgan & Associates.  
760 Submission 129.  
761 Submission 97.  
762 Comments made at Sydney consultants meeting August 1996.  
763 Submission 106.  
764 Submission 124.  
765 Submission 136.  
766 Submission 126.  
767 Submission 76.  
768 Submission 65.  
769 Submission 32.  
770 eg HREOC Inquiry into racist violence.  
771 Submission 55.  
772 Submission 55.  
773 Submission 101.  
774 Submission 124.  
775 Submission 115.  
776 The Australian Capital Territory Domestic Violence Community Law Reform Committee, Canberra 1995, 82.  
777 id 103.  
778 Correspondence from CAPV dated 23 September 1996.  
779 Submission 106.  
780 Submission 45  
781 The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966.  
782 Australia did not ratify Article 4(a).  
783 The Convention opened to signature on 7 March 1966 and was adopted by the General Assembly of the United Nations on 21 December 1965.  
784 The Convention was adopted by the General Assembly of the United Nations in December 1984 and entered into force on 26 June 1987.