Inquiry into the CCC being able to prosecute its own charges

This submission is made in response to the Committee on the Corruption and Crime Commission calling for submissions on the Corruption and Crime Commission being able to prosecute its own charges.

I am currently a doctoral student at Edith Cowan University undertaking research in the area of government oversight agencies. In 2011 I conducted post graduate research into the operations of police oversight agencies in Australia. The Master of Criminal Justice research, titled *Police oversight agencies: A model analytical tool for comparative evaluations,* identified a best practice model to assist governments in establishing or reviewing an oversight agency. The research identified a number of important elements including prosecution arrangements.

I would like to thank the Committee for providing an opportunity to make a submission and provide a summary of my past and current research.

Sincerely

Bernadine Tucker

Introduction

Since their inception, the operations of Australian police oversight agencies have received considerable negative media attention. That attention has focused on the agencies' coercive powers when answering questions, their telecommunication and surveillance powers or the outcome of high profile investigations.

Each state-based law enforcement oversight agency has been structured mostly on domestic models preceding it. For example, the Corruption and Crime Commission of Western Australia adopted similar legislation and powers to the Police Integrity Commission (PIC) in New South Wales and the Crime and Corruption Commission in Queensland (now known as Crime and Misconduct Commission). The PIC was influenced by its predecessor, the Criminal Justice Commission. Therefore, problems associated with earlier models have the potential of being replicated in subsequent models (Ross & Tucker, 2008).

Lewis and Prenzler (1999, p. 6) contended that "it is doubtful that there is a single best model" although there has been little discussion as to what would constitute an appropriate model for oversight. There is no reported longitudinal study on police oversight agencies and little information available to assist decision makers when developing legislation and governance arrangements for these agencies (Ross & Tucker, 2008). To overcome potential problems caused by a lack of information, experts in the police oversight field were brought together, using the Delphi method of research, to gain agreement on a preferred model.

Delphi Method – developing a model oversight agency

Described as an iterative process (Lynn, Layman, & Englebardt, 1998; Skulmoski, Hartman, & Krahn, 2007), the Delphi method employs a series of questions to elicit qualitative and quantitative data via anonymous responses from carefully selected experts. Referred collectively as the Delphi panel, each participant anonymously answers propositions via a Delphi monitor, the researcher. The first round of questions provides qualitative data which are analysed using content analysis techniques (Hasson, Keeney, & McKenna, 2000), with subsequent rounds utilising quantitative measuring methods (Skulmoski et al., 2007). At the end of each round, collated responses are returned to the panel allowing further comments, opinions and issues to be raised.

The process of distributing the questions via surveys and collecting responses continues until stable answers are reached between each round, that is, according to Duboff (2007) "until consensus grows or ebbs". Therefore, at least two rounds are needed with each building upon previous results (Keeney, Hasson, & McKenna, 2001). Participants have an opportunity to revise their initial responses based on this summary, ultimately converging towards a model for accepted practice.

Four reasons rendered the Delphi method a particularly pertinent approach for this research. Firstly, the survey method permits the elicitation of both qualitative and quantitative data which allows for broader perspectives to be obtained, building trustworthiness in the results. Secondly,

Delphi is suited to a variety of disciplines and has been used extensively in health care, science, technology and policy formation with an emergence in government. A third reason for employing Delphi is its pragmatism. Delphi is an economical and practical strategy for approaching research questions. The internet has made the method easy and inexpensive to implement as experts can be recruited and involved on-line, negating the need for face-to-face interviews. Finally, Delphi is a proven method in eliciting expert opinion (McKenna, 1994; Masser & Foley, 1987). Over 40 years ago, Sackman (1975) saw Delphi as merely a structured brainstorming session. However, since then, it has been used extensively for requesting and collating specialist professional opinions.

Though Delphi has been used extensively in other disciplines, Loo (2002, p. 762) claimed "this potentially powerful method has been neglected in the police management field". Here the panel recruitment is outlined and the analysis of each round reported. The paper concludes with a discussion of the results of the research.

Identifying panel members for input into the research

Panel members were sourced from four key target groups; that is, individuals who have particular subject knowledge or working relationship with police oversight agencies. The target groups identified through a literature review were 1) police agencies, those who are oversighted; 2) those agencies who oversight police; 3) those agencies that oversight the oversight agencies; and 4), leading academics in the police oversight field. Individually, the four target groups represent a small field of experts; therefore the panel recruitment consisted of a saturated sampling of industry stakeholders. As the Australian target group was small, the research expanded to international organisations oversighting police who operate under a parliamentary government system, similar to Australia.

Through an on-line search, 60 agencies or people were identified as stakeholders in the research outcomes, with 14 having international origins. Invitations to participate in the research were extended to these 60, and positive responses were received from 28 respondents. During various stages of the research, 6 participants withdrew leaving a final panel of 22 members from three of the four target groups. The demographics of the panel member recruitment are shown in Table 1. The 'agencies that oversight the oversight agencies', the smallest group of potential participants, were not represented in the study. Representation of the other three groups is roughly proportionate to the stakeholder pool.

The panel members were advised that their individual responses would remain anonymous, but were given the option to reveal their identity as a panel member so others would know who was involved in the research. Of these 22 panel members, 13 agreed to be identified during progression of the research with the remainder preferring anonymity.

Table 1
Demographics of Panel Member Recruitment

Stakeholder group	Invitations nationally (n)	Invitations internationally (n)	Final national panel members (n)	Final international panel members (n)
Police agencies: those oversighted	9	5	4	0
Agencies who oversight police	12	10	10	3
Those who oversight the oversight agencies	4	0	0	0
Leading academics in police oversight	20	0	5	0
TOTAL	**45**	**15**	**19**	**3**

Panellist demographics

Police agencies – those oversighted

Six policing agencies agreed to participate in this research and were all Australian based. Five were state organisations with one federal with each possessing a dedicated unit to investigate complaints regarding officers.

Those agencies who oversight police

A web-based search identified 22 agencies that oversight police. This comprised 12 Australian based agencies and ten international organisations. Functions of each agency varied greatly, with some dedicated solely to police oversight. A positive response was received from ten Australian agencies and three international organisations. The agencies were canvassed throughout the research to ascertain if permission was granted to reveal their identity of which seven consented.

The oversight agencies participating in this research were:

- Australian Commission for Law Enforcement Integrity, Commonwealth of Australia;
- Corruption and Crime Commission, Western Australia;
- Independent Police Conduct Authority, New Zealand;
- Crime and Misconduct Commission, Queensland;
- Police Complaints Authority, South Australia;
- Ombudsman Tasmania; and
- Police Ombudsman for Northern Ireland.

Those agencies that oversight the oversight agencies

Four agencies that supervise oversight agencies were identified and invited to participate in the survey. All four were Australian based with state jurisdiction. Although all four agencies originally agreed to be involved in the research, all four subsequently withdrew at the first round survey stage.

Leading Academics in the police oversight field

All Academics approached for this research were based in Australia. A comprehensive literature review identified that most current peer reviewed journal articles and books were authored by Australian academics. Due to the recentness of the publications, it was decided it was unnecessary to expand the invitation abroad. Twenty Academics were invited to participate in the research with five positive responses being received. These five people, throughout the research, were canvassed to ascertain if they consented to their identity being published and all five agreed.

The Academics involved in this research were:

- Dr Frank Morgan, Director, Crime Research Centre, University of Western Australia;
- Associate Professor Colleen Lewis, Criminology, Monash University
- Tim Prenzler, Chief Investigator, Australian Research Council Centre of Excellence in Policing and Security, Professor, School of Criminology and Criminal Justice, Griffith University;
- Rick Sarre, Professor of Law and Criminal Justice, University of South Australia; and
- Dr Darren Palmer, senior lecturer in Criminology, Faculty of Arts and Education, Deakin University.

Delphi research – Findings from round one

The initial survey was developed from a critical review and synthesis of the literature, and contained 25 questions. These questions identified possible influences on the functions of independent police oversight agencies and were themed into three sections: 1) how an independent police oversight agency is set up; 2) what an independent police oversight agency does; and 3) how an independent police oversight agency functions.

Questions in the first section asked participants to respond to issues relating to how an independent police oversight agency should be established. These covered the structural management of the agency, appointments, community representation and accountability. The second section targeted specific operational functions that may be required, and the final section centred on how the agency carries out those functions.

Round one was completed via a hard copy survey asking for qualitative responses using a combination of open and closed questioning. Responses were imported into a Microsoft Excel spreadsheet, grouped into like themes and descriptive labels allocated. Using these labels, the responses were plotted onto bar graphs to give a visual overview of the frequency of responses. The percentage agreement scores were calculated for each of the response labels based on total panel composition of 22 members. These results were then distributed to panel members.

The decision to use percentage agreement scores to analyse the results was in line with other researchers using Delphi (Biondo, Nekolaichuk, Stiles, Fainsinger & Hagan, 2008; Hert & Harris, 2006; Boggatz, Farid, Mohammedin, Dijkstra, Lohrmann & Dassen, 2009; Mayo, et al., 2009). It was determined early in the research that a threshold of 80% would be applied to indicate high consensus. In using this limit to analyse the Round one results, high consensus was reached on seven questions, including one returning a 100% positive response. Therefore, these questions were not explored further in round two.

Delphi – Findings from round two

Round two focused on 17 questions. Although 18 questions were still outstanding from round one, two questions were combined as respondents had linked the items together in their comments. Using a web browser, round two was developed using an on-line survey tool that had the ability to customise email questionnaires, track and collect responses and automatically send reminders. The online survey was constructed to allow panel members to rate their level of agreement with each statement on a 5-point Likert scale ranging from 'strongly disagree' to 'strongly agree'. Each question included anonymous participant comments from the previous round allowing panellists the opportunity to consider the comments and opinions expressed. A space for comments was provided to allow participants a further opportunity to include their own views, suggestions and comments.

As with round one, responses were plotted into bar graphs that gave a visual indication of results. The Likert scale was scored by using a mid or neutral value with both positive and negative values either side (Clayton, 1997; Hert & Harris, 2006; Pulford, Adams & Sheridan, 2009). The categories *strongly disagree* and *disagree* were combined to form a total level of disagreement, and the results of *strongly agree* and *agree* were combined to indicate the level of agreement and the percentage calculated. Responses of *unsure* were categorised separately. Scores of at least 80% agreement were deemed to indicate high consensus, resulting in seven of the 17 questions asked achieving high consensus and needed no further exploration.

Delphi – Findings from round three

Ten questions not reaching consensus in the previous rounds formed the third questionnaire. Again, the panel's anonymous comments and the previous percentage agreement scores were included. The same on-line survey software was utilised allowing panel members to evaluate their level of agreement with each statement from *strongly disagree* to *strongly agree* on the Likert scale. However as the mid or neutral value was rarely used by panel members in round two, the Likert scale for round three omitted this neutral point. Responses for *strongly disagree* and *agree* were again used to calculate the percentage of agreement with each statement. Of the remaining 10 questions, 4 reached high consensus, 4 were classed as receiving moderate consensus, that is, agreement between 60% and 79% and the remaining two were below 60%. After considering the results of round three, it was determined that a fourth round was unlikely to contribute further to the research.

Results of the Delphi method: towards developing a model oversight agency

After three rounds of Delphi, high consensus was achieved on 18 of the 24 questions asked. The full results are shown in Table 2. The first section, how an independent police oversight agency is set up, consisted of 4 questions with none achieving consensus in the first round. The second round returned high consensus on 2 questions and round three resulted in consensus on one of the outstanding 2 issues. This outstanding question, when weighted against the consensus criteria, was deemed to have a low level of agreement.

The second section of questions described what an independent police oversight agency does. In all, 15 questions were asked relating to the operational functions of an oversight agency. The first and second rounds achieved consensus on 6 and 5 questions respectively with the final round failing to build on these scores. Of the remaining four questions, moderate consensus was achieved on three, with the fourth question falling below the 60% moderate threshold.

The final section focused on the functions of an independent police oversight agency and asked respondents to indicate their level of agreement with six questions. One question reached consensus in the first round, none in the second and three reaching or exceeding the 80% benchmark in the final round. The outstanding two questions were deemed to represent moderate consensus.

Table 2
Delphi questions and the level of consensus

| Delphi Question	Level of agreement (%)
How an independent police oversight agency is set up	
Ultimate responsibility for the decisions and actions of a police oversight agency is managed by one person.	92
As the oversight agency is independent of police, the appointed person (e.g. Commissioner) to manage the agency should be appointed by an independent panel.	86
For accountability purposes, it is important that the independent police oversight agency report to Parliament via a parliamentary committee.	85
The level of involvement by a community representative in an independent police oversight agency should be as a consultative member only.	55

Delphi Question	Level of agreement (%)
What an independent police oversight agency does	
The independent police oversight agency should be able to conduct targeted integrity testing.	100
The agency should be able to recommend policy review.	100
The independent police oversight agency should be able to issue and execute search warrants	94
The agency should have telecommunication interception and surveillance device powers.	93
The agency should have coercive powers in relation to answering questions.	93
The independent police oversight agency should be able to conduct targeted drug testing.	92
The agency should have prevention, research and an education function.	87
The powers of the agency should include the capacity to investigate civilian personnel working within police and/or civilians working outside of police but who have associations with police.	87
For the effective operation of an independent police oversight agency, the power to investigate organised crime is necessary if linked to police.	86
Criminal offences arising from investigations by the independent police oversight agency should be prosecuted by a Government prosecuting agency.	83
The agency should have inquisitorial powers when conducting hearings.	80
Police oversight agencies do not require armed investigators.	73
It is necessary for a police oversight agency to have the power to arrest.	60
Hearings conducted by independent police oversight agencies are mostly held in private.	54

Delphi Question	Level of agreement (%)
How an independent police oversight agency functions	
With an internal police disciplinary matter, the independent police oversight agency should have the right to raise their concerns in Parliament.	92
Investigations into police by an independent police oversight agency are best conducted by a combination of investigators from police and non-policing backgrounds.	87
The agency should be able to recommend disciplinary, managerial or termination action.	87
Investigations into police conduct by the independent police oversight agency need to meet the:	
"On the balance of probabilities" test;	86
"Briginshaw" test.	83
The independent police oversight agency's role in internal police disciplinary matters should be limited to only oversight of the internal disciplinary process.	72
Particular matters investigated by the police oversight agency into police conduct should be legislated.	71

Discussion of the results

The results from this study indicate a best, or at least an agreed, practice model for independent police oversight agencies. This best practice model is depicted in Figure 1. It suggests that the oversight agency be managed by one person, responsible to a Parliament through a Parliamentary Committee and appointed by an independent panel. The resulting operation of the agency is described by the matters achieving high consensus in the Delphi study, categorised into three arms: 1) investigations; 2) functions; and 3) powers.
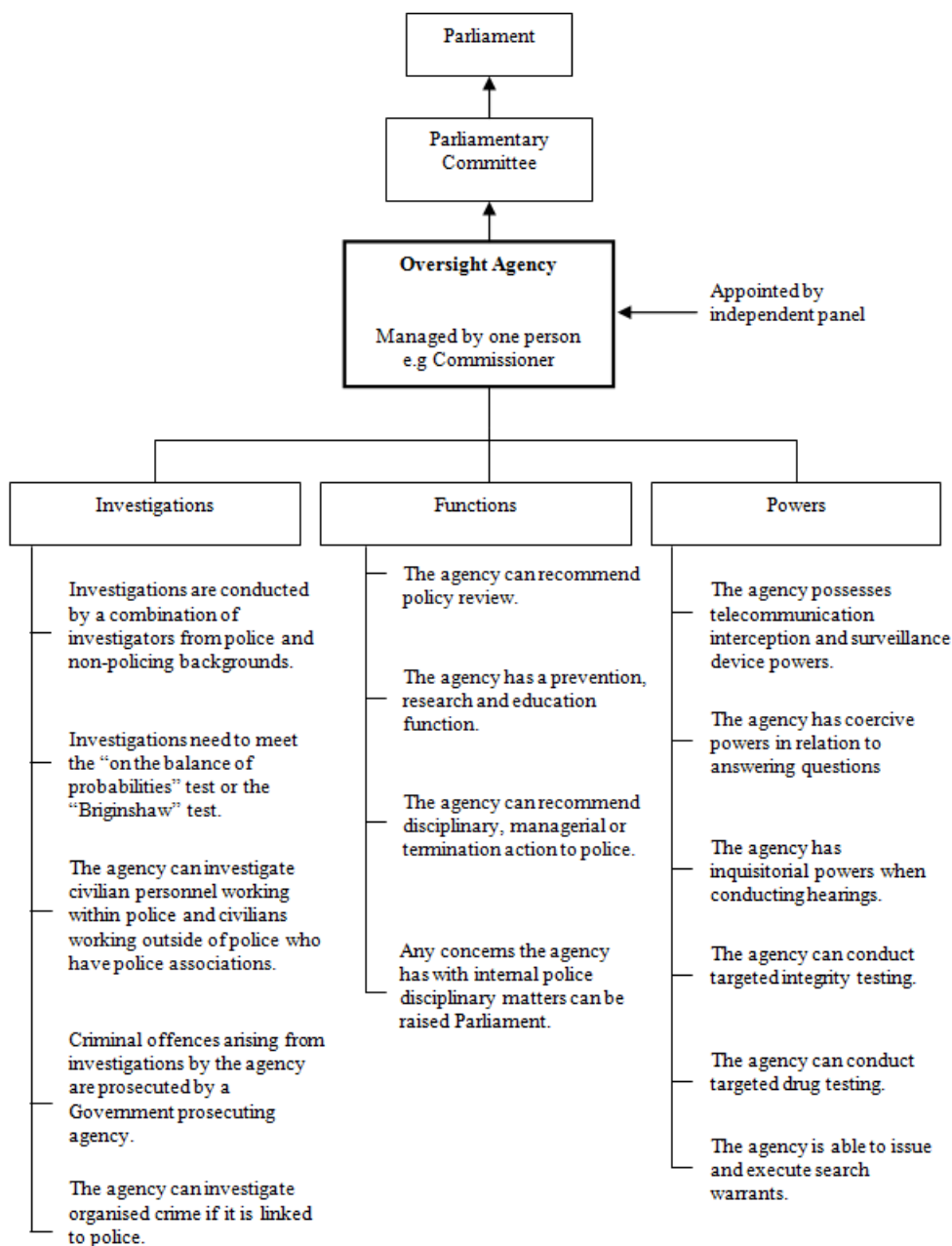
Figure 1. A best practice model for independent police oversight agencies

The investigation arm of the model recommends a combination of investigators from police and non-policing backgrounds using the 'Briginshaw' or 'on the balance of probabilities' test. Further, the agency can conduct investigations into civilians who work with, or who have associations with police and any resulting criminal offences prosecuted by a government prosecuting authority. The model also allows for investigations to be conducted into organised crime if it can be linked to police.

The second arm of the model, functions of an independent police oversight agency, includes being able to recommend to police policy review, along with disciplinary, managerial or termination action. Any resulting concerns the agency may have with internal police disciplinary matters can then be raised in Parliament. Results of the study also indicate the agency should possess a prevention, research and education function to assist police.

The third and final arm covers the powers an agency should possess. These include telecommunication interception and surveillance device powers, coercive and inquisitorial powers, and being able to conduct targeted integrity and drug testing of police officers. To facilitate any investigations, the agency should also possess the power to issue and execute search warrants.

In summary, this research has used the Delphi technique to develop a preferred model for independent police oversight agencies providing an analytical tool for comparative evaluations. Its use may assist governments in identifying the best consensual arrangements when establishing an agency, including the reporting, structures and powers, and similarly it will assist in reviewing the effectiveness of existing organisations. While it is acknowledged other factors influence operational efficiency, this research has identified a variety of common functions and arrangements that appear to correlate with success.

Oversight agencies – current research

Following on from the 2011 Delphi results, further research has been conducted into the operational effectiveness of oversight agencies and why, considering their popularity across Australia, are they failing to prevent corruption and misconduct from occurring in the public sector.

The complaints review process was explored and although external review through oversight agencies promoted accountability, traditionally this was viewed as the court's role. However, holding people accountable to law rarely builds public confidence due to the "gap between what we produce for the prosecutors and what we produce for the public" (Hardwick cited in Stone, 2005).

Nevertheless, some academics advocate that oversight agencies are an effective tool in dealing with public sector misconduct. However, more attention has been directed towards identification rather than prevention initiatives (Prenzler, 2011) and overtime, public sector accountability has not improved (Prenzler & Porter, 2016). Therefore, not only does government require the power to enforce accountability in the public sector, but the political will to do so (Tucker & Larsen, 2016). However this may be difficult as government's "seek a stable balance between the need for central political control and accountability and pressures for agency autonomy and professional independence" (Aulich 2012, p.49).

Viewing oversight arrangements through a Corporate Social Responsibility lens (CSR), two sides of the theory are revealed. The first side focuses more on strategic direction whereas the second side focuses on moral and ethical concerns. It is through this second side that calls for increased integrity, transparency and accountability occur alongside an expectation that certain

mechanisms will be in place to deal with misconduct (Ghosh & Chakraborti, 2014). In effect, accountability processes becomes an image management issue (Chan, 1991).

It is in this vain that the ability for the Corruption and Crime Commission (CCC) to prosecute corrupt conduct and misconduct is explored. There is little doubt that the CCC creates public value and fosters an environment of accountability. However, poor substantiation rates in the judicial system and inadequate punishment has the potential to erode public trust and fuel perceptions of bias. Essentially, although the 'public value' can be easily created, it can just as easily be destroyed (Jørgensen & Rutgers 2015). The destruction of the 'public value' is evidenced in Australia through Royal Commissions of inquiry and oversight agency investigations into matters such as policing, political lobbying and land developments. Indeed, the Smith's Beach Inquiry of 2007 (Corruption and Crime Commission, 2007) produced harsh criticism of the CCC's processes by the Parliamentary Inspector and ultimately publicly challenged the credibility of the CCC.

My research in 2011 revealed that criminal charges initiated by the CCC ought to be prosecuted by a government prosecuting authority i.e. the Director of Public Prosecutions (DPP). Not only would this promote transparency and impartiality, but also an opportunity for independent review. Using a CSR framework as an evaluation tool, this suggestion would align government accountability with the public interest, promote social justice and endorse the CCC as an accountable and balanced decision maker. It is important to note that the professionalism and expertise of the CCC's legal team is not in dispute. Moreover, it is the public perception that needs to be managed as it is public expectation that legitimises any organisation.

The Western Australian Government's decision to implement the CCC has sent a powerful message to the community that they are addressing the community's expectations regarding public sector misconduct. Although this could be seen as a positive step towards public sector organisations being good corporate citizens (instead of being seen as irresponsible), it is timely to implement improvements to maintain public legitimacy. The realignment of the prosecuting function to the DPP would be a positive move that wouldn't compromise or undermine the current operational structure of the CCC.

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