

COMPLAINTS ABOUT AUSTRALIAN INTELLIGENCE ORGANISATIONS AND THE POTENTIAL USE OF MEDIATION

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I INTRODUCTION

Public complaints about the operations of the Australian Intelligence Community ('AIC')¹ are increasing. The Inspector-General of Intelligence Services ('IGIS') reported in 2002 that 'the number of complaints leading to preliminary or full inquiries more than doubled from the previous reporting year'.² This increase in complaints has been identified as not reflective of 'any lowering of standards by the agencies',³ but rather as resulting from a number of external factors which have 'raised public consciousness of intelligence and security matters'.⁴ For example, the rise in global terrorism and consequential increase in AIC activity, heightened media publicity about Intelligence issues, and public debate about related controversial federal legislation, including counter-terrorism proposals.⁵

The reality of the current global environment, and the strength of presence of the threat of terrorism, means that activity on the part of the AIC is likely to remain at

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¹ Whilst there are a number of other intelligence agencies in the law enforcement field, for the purposes of this article the term AIC incorporates only the Australian national intelligence agencies as defined by s 3 of the *Inspector-General of Intelligence and Security Act 1986* (Cth). These organisations include: Australian Security Intelligence Organisation ('ASIO'), Australian Secret Intelligence Service ('ASIS'), Defence Signals Directorate ('DSD'), Defence Imagery and Geospatial Organisation ('DIGO'), Defence Intelligence Organisation ('DIO') and the Office of National Assessments ('ONA').

² W Blick, *Inspector-General of Intelligence and Security Annual Report 2001 – 2002* (2002) Commonwealth of Australia, 11 <www.igis.gov.au> ('IGIS Annual Report').

³ IGIS Annual Report, 17.

⁴ Ibid 16.

⁵ See the *Intelligence Services Act 2001* (Cth) and proposed amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth).

increased levels for some time.⁶ With this comes increased interaction with the public and as a result the potential for greater numbers of complaints.

This article considers the way in which complaints about the AIC are currently dealt with through the office of the IGIS and looks at the possibility of incorporating mediation into the IGIS' complaints resolution practice. The current mode of handling complaints is formal, resource intensive and involves limited participation by both agencies and complainants. Whilst this system ostensibly holds the AIC accountable, it does not necessarily lead to complainant or agency satisfaction with the process or outcome. The contemporary complaints environment therefore offers significant potential for an increase in the use of informal dispute resolution methods such as mediation. This is because informal processes offer greater opportunities for transparency in AIC agency accountability, resource savings, efficiency, flexibility, and increased participation on the part of complainants and agencies.

II THE ROLE OF THE IGIS AND CURRENT COMPLAINTS RESOLUTION PRACTICE

A *The Role of the IGIS*

The IGIS is the key statutory office for the resolution of complaints against Australia's Intelligence agencies. The office was established in 1987 to help ministers responsible for Intelligence organisations to 'oversee and review their activities'.⁷ A part of this process is responding to a complaint about an agency, although as the IGIS notes in his⁸ 2001-2002 Annual report, 'in recent years inspection of the activities of the collection agencies (ASIO, ASIS, DSD and DIGO) has occupied the bulk of the effort of the office'.⁹

The types of complaints received by the IGIS from members of the public include, for example, 'allegations of unlawful "bugging" of telephones, inappropriate surveillance, delays in security assessments of asylum seekers and inappropriate involvement in court matters'.¹⁰ Complaints made to the IGIS can include complex factual and emotional issues to do with an agency's conduct against a complainant. Complaints often concern a complainant's privacy and personal security. They can range from potential breaches of the law to matters where the complainant has taken offence at an agency officer's actions or conduct.

The complaints resolution role of the IGIS is not dissimilar to that of a specialist ombudsman. Characteristics that the IGIS shares with other ombudsmen include; being generally a point of last administrative resort, operating free from strict rules of evidence, having a role of significant influence, and sharing a commitment to fairness,

⁶ Note the statement, for example, in ASIO's 2002-2006 *Corporate Plan* that: 'The 11 September 2001 terrorist attacks have changed the security situation internationally and for Australia. We face heightened levels of threat, and more broadly, a diverse and volatile international and regional environment. At the same time we face challenges arising from rapid technological change, particularly in telecommunications and information technology'. <www.asio.gov.au/Publications>.

⁷ IGIS Annual Report, 8.

⁸ The current IGIS is Mr Bill Blick. He was appointed to the office in February 1998.

⁹ IGIS Annual Report, 10.

¹⁰ See <www.igis.gov.au/complaints>. See also the Annual Reports of the office of the IGIS for details of complaints dealt with by the IGIS.

responsiveness, and accountability.¹¹ Currently complaints from the public are received, investigated and concluded by the IGIS in a way that fits classical models of dealing with administrative complaints.¹²

B Current IGIS Complaints Process

Complaints to the IGIS must be made in writing.¹³ Preliminary inquiries, which are relatively informal, are used to establish jurisdiction over a complaint and whether the matter warrants further consideration.¹⁴ The preliminary inquiry process is relatively successful, with 20 of the 26 new complaints made in 2001 – 2002 being finalised at this stage.

In deciding whether a complaint should be fully investigated the IGIS will take into account a number of factors. These include, 'how long ago the events which led to the complaint occurred, whether the agency concerned has conducted or is conducting a review of its own, whether the matter should be referred elsewhere, and whether the matter is serious enough to warrant investigation'.¹⁵ The *Inspector-General of Intelligence and Security Act 1986* (Cth) ('the Act') provides the IGIS with a discretion not to proceed with an investigation where 'the complainant became aware of the action more than 12 months before the complaint was made',¹⁶ where 'the complaint is frivolous or vexatious or was not made in good faith',¹⁷ or where 'having regard to all the circumstances of the case' an inquiry is deemed unwarranted.¹⁸

Where the IGIS decides to commence an inquiry the Act requires him to inform the responsible Minister and the head of the relevant agency.¹⁹ The IGIS is given a wide discretion as to the conduct of investigations with the Act providing that inquiries shall be conducted in private and 'in such a manner as the IGIS sees fit'.²⁰

Investigations typically involve discussions with, and briefings from, the relevant agency, inspection of files and documents, and interviews with people involved with

¹¹ D Bevan, 'Address to Student Ombudsmen Conference' (Paper presented at the 3rd Australasian Conference of Ombuds and Deans of Students in Higher Education, QUT Brisbane, 14 February 2002) 2; <www.qut.edu.au/ombudsman.html> 10.

¹² See, for example, W Wade and C Forsythe, *Administrative Law* (Oxford University Press, 8th ed, 2000); A Ardagh, *Administrative Law* (LBC Information Services, 4th ed, 1999); M Allars, *Australian Administrative Law – Cases and Materials* (Butterworths, 1997) Chapter 6, 300; R Tomasic and D Fleming, *Australian Administrative Law* (Law Book Company, 1991) Chapter 3, 265; see also, MP Rowe, 'The Ombudsman's Role in a Dispute Resolution System' (1991) 7 *Negotiation Journal* 353.

¹³ Pursuant to s 10 of the *Inspector-General of Intelligence and Security Act 1986* (Cth) a complaint may be made orally or in writing, however where it is made orally the IGIS shall either put the complaint in writing or require the complainant to do so. In the event that the complainant refuses to put the complaint in writing the IGIS has the discretion to refuse to inquire into the complaint further.

¹⁴ See *Inspector-General of Intelligence and Security Act 1986* (Cth) s 14.

¹⁵ See <www.igis.gov.au/complaints>.

¹⁶ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 11(2)(a).

¹⁷ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 11(2)(b).

¹⁸ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 11(2)(c).

¹⁹ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 15.

²⁰ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 17(1). In 2001-2002 six new full inquiries were completed.

the substance of the complaint.²¹ The IGIS has the power under the Act to access information and documents²² and to enter agency premises²³ for the purposes of inquiries, and also to consult with the relevant Minister or the Prime Minister before completing an inquiry.²⁴

Once an investigation is complete the IGIS prepares a draft report in which his conclusions and recommendations are set out.²⁵ This draft report is provided to the relevant agency for its comment and response. A final report is then prepared. This is provided to the agency and the complainant is given a written advice of the outcome.²⁶ If the complaint is considered justified the IGIS may make recommendations for correcting the problem identified through the complaint and consult with the relevant agency head and the responsible Minister.²⁷ If the IGIS does not uphold the complaint the complainant receives a written explanation.²⁸

The existence of the office of the IGIS is a significant contribution to accountability and appropriate complaints handling in relation to Australian Intelligence organisations.²⁹ The office's processes and procedures are, however, quite formal and exclude face-to-face active participation in the resolution of a complaint by a representative of the relevant agency and the complainant.

In the contemporary security environment the public is likely to become more and more concerned with the operations and practice of Intelligence organisations. An increasingly sensitive public may also take greater issue with Intelligence organisation activity. It is this context in which complaints resolution practice might be used as an opportunity for public awareness raising and education on issues relevant to AIC activity, and to create a cooperative environment between the public and the AIC. It seems appropriate then to consider developing more informality and inclusivity, where possible, of both AIC agencies and complainants in the complaints resolution processes employed by the IGIS.

The following section outlines how the informal dispute resolution process of mediation might be used more frequently by the IGIS to resolve complaints and also to foster greater public cooperation and confidence in the work of the AIC.

²¹ The *Inspector-General of Intelligence and Security Act 1986* (Cth) specifically states that the IGIS is under no compulsion to interview anyone including the complainant in relation to a complaint; see s 17(3).

²² *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18.

²³ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 19.

²⁴ *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 17(7), (8).

²⁵ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 21(1). Under s 21(2) any comments of the head of the agency should be included in the final report.

²⁶ *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 22, 23.

²⁷ 'The IGIS can recommend that an agency reconsider or change a decision, change its rules or procedures, or pay compensation for any loss that has been suffered as a result of its decisions or actions'. See <www.igis.gov.au/complaints>.

²⁸ *Inspector-General of Intelligence and Security Act 1986* (Cth) s 23.

²⁹ H McComas, "'Quis custodiet custodiet?' Who will guard the guardians? Accountability in Intelligence' (2002) 10 *Journal of the Australian Institute of Professional Intelligence Officers* 31, 32-33.

III MEDIATION AND THE RESOLUTION OF COMPLAINTS ABOUT INTELLIGENCE ORGANISATIONS

There are a number of reasons why the option of mediation as a formal inclusion in the processes available to the IGIS under the Act should be considered. First, as was noted above, informal dispute resolution processes promote the bringing of parties to a complaint together and this can assist in the development of transparent and accountable practice and procedure on the part of Australian Intelligence organisations. This principle has already been endorsed at an agency level as being in the interests of Australia's security operations.³⁰ Second, mediation, as a consensual dispute resolution process that is based on developing understanding and enhancing communication, promotes principles of justice that are key to public perceptions of good government.³¹ Third, mediation is an efficient and economically sound dispute resolution option for government agencies. As the Queensland Ombudsman has acknowledged, formal modes of investigation of administrative complaints 'are resource intensive and are not always the most effective way of achieving a satisfactory outcome for the complainant and the agency'.³²

Pearce has also identified a number of reasons why informal dispute resolution practice is important in administrative and government contexts. These reasons include: the speed with which matters can be processed, accessibility, cost-effectiveness, and the non-threatening nature of such processes for the participants.³³

It is acknowledged that the use of preliminary inquiries by the IGIS is already a positive practice allowing greater informality and efficiency in the resolution of matters.³⁴ This article is focused however on the introduction of a particular model of dispute resolution procedure, mediation, which would involve bringing complainants face-to-face with a representative of the relevant agency, where their discussions about the complaint would be facilitated by an appropriately trained officer from the office of the IGIS.

³⁰ For example, ASIO made the statement in a submission to the Parliamentary Committee on ASIO that: 'ASIO seeks to provide as much information to the public as possible, within the constraints of security and resources'; Submission to the Parliamentary Committee on ASIO, *An inquiry into the nature, scope and appropriateness of the way in which ASIO reports to the Australian public on its activities* (5 July 2000) 6. Note also the following comment that: '... the good guys – that is, the forces of law enforcement and intelligence – have to expose themselves to a level of public accountability which may in some small way hinder their effectiveness. But that is the balance that we insist on in a democratic society'; N Waters, *Australian Privacy Charter Council, Transcript of Evidence* (17 July 2000) 29.

³¹ L Boule, *Mediation: Principles, Process and Practice* (Butterworths, 1996) 62.

³² Bevan, above n 11, 8.

³³ D Pearce, 'The Ombudsman: review and preview the importance of being different' (1993) 11 *Ombudsman Journal* 13-36, 14.

³⁴ Menkel-Meadow has acknowledged that ombuds activity (particularly in terms of processes used for preliminary inquiries) is a hybrid of mediation: C Menkel-Meadow, *Mediation* (Ashgate, 2001) xxx. Bevan has commented that preliminary inquiries conducted by ombuds can amount in some instances to a form of shuttle mediation: Bevan, above n 11, 8.

A *Mediation and the Office of the IGIS*

Whilst there has certainly been a recent emphasis on alternative methods of dispute resolution such as mediation across public and private spheres,³⁵ it is not true to say that mediation is at all novel. Justice Kirby (amongst others) has pointed out that ‘for centuries, priests, lawyers and other citizens have helped to mediate disputes’.³⁶

A mediator is essentially a peace-maker and intermediary who assists in resolving a dispute before resort to an adjudicator for a final decision is necessary.³⁷ The mediation process aims to allow disputants an opportunity to discuss their concerns, explain their views and explore options for resolution in a confidential, open and neutral environment.³⁸ It is a process that is generally considered economically and resource efficient, whilst catering to the human side of dispute resolution.³⁹ It is therefore a very suitable option for an office such as that of the IGIS which we predict will be dealing with increasing numbers of emotive complainants, some of whom may simply need a forum in which to have their ‘story’ heard or acknowledged, and an opportunity to better understand AIC practices.

Mediation has been variously defined and there are a number of different models that are applied in various contexts.⁴⁰ Differences in these models are usually based on the final goal of the process. For example, therapeutic mediation has the goal of reconciling the parties and resolving the underlying causes of their conflict; in this model mediators are facilitative and take on what might be considered a counsellor role. Evaluative mediation has the goal of reaching a settlement between the parties based on their legal rights; in this model mediators are interventionist and advisory.⁴¹

In terms of developing a model of mediation that is appropriate for use by the IGIS it seems appropriate to focus on the traditional philosophical basis of the process, namely, skilful facilitation of direct participation in consensus dispute resolution by the parties to a dispute.⁴²

³⁵ For example, the Family Court of Australia has led the way in attempts to institutionalise alternative dispute resolution procedures. See the *Courts (Mediation and Arbitration) Act 1991* (Cth) which introduced amendments to the *Family Law Act 1975* (Cth) to include mediation in the Court's processes. Further amendments to the *Family Law Act 1975* (Cth) enacted in 1996 also encourage the use of alternatives to litigation.

³⁶ M Kirby, ‘Mediation - Current Controversies and Future Directions’ (1992) 3 *Australian Dispute Resolution Journal* 139, 140.

³⁷ S Charlesworth, ‘Still Waiting in the Wings - Mediation and the Legal Profession’ (1991) 65 *Law Institute Journal* 59. Mediation can be seen as both ‘an ideology (of peace-seeking, transformative conflict-resolving human problem-solving) and a practice (of task-oriented, communication enhancing dispute resolution)’: Menkel-Meadow, above n 34, xvii.

³⁸ Department of Justice and Attorney-General, QLD, Alternative Dispute Resolution Division, *Annual Report 1994-1995*, 12.

³⁹ S Roberts, ‘Mediation in the Lawyers' Embrace’ (1992) 55 *Modern Law Review* 258, 259.

⁴⁰ Numerous writers acknowledge the definitional problems associated with mediation. See for example, H Astor and C Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) 135-136; and Boulle, above n 31, 3-4.

⁴¹ See Boulle, above n 31, 28-30.

⁴² L Street, ‘The Philosophy of Mediation’ (Paper Presented at the Fifth International Criminal Law Conference, Sydney, 25-30 September 1994) 2.

Sir Laurence Street has identified three fundamental principles of mediation that relate to this philosophical foundation. First, mediation ‘originates in an agreement between the disputants to call in the aid of a facilitator to assist in the structuring and conduct of settlement negotiations’.⁴³ This means, in the context of complaints made to the IGIS, that both the agency and the complainant need to agree to using the process, and need to be committed to using it constructively.⁴⁴ There would be no compulsion to proceed, for example, if an agency had any concerns about participating in a mediation and advised that formal inquiries would be a more appropriate avenue for the resolution of a particular complaint. Secondly, ‘the facilitator has no authority to impose a solution on a disputant’.⁴⁵ This means that the mediation is unsuccessful if the agency and the complainant do not reach an agreement themselves. In this event, the usual formal processes of the IGIS’ complaints resolution practice would be invoked. Thirdly, ‘the whole process remains at all times entirely flexible and dependent upon the continuing willingness of the disputants to continue it until such time as either they themselves agree upon the terms of settlement or one or other of them terminates the negotiations; it is, in short, consensus-oriented’.⁴⁶

B *A Proposed Model of Mediation for Use by the IGIS*

On the basis of this underlying philosophy, a process is proposed below for use in the resolution of complaints about AIC activity by the IGIS. It is a model based on that used by the Dispute Resolution Centres in Queensland that operate through the Department of Justice and Attorney-General’s Alternative Dispute Resolution Branch.⁴⁷ This model is a facilitative model of mediation which involves interest-based problem solving,⁴⁸ the main objective of which is ‘to avoid positions and negotiate in terms of the parties’ underlying needs and interests instead of their strict legal entitlements’.⁴⁹ The principal role of the mediator in this model is to ‘conduct the process, and maintain a constructive dialogue between the parties’.⁵⁰

Implementation of the model proposed here would involve amendments to the Act based on the *Dispute Resolution Centres Act 1990* (Qld) (‘DRC Act’). Under the model mediation sessions would be conducted with as little formality and technicality, and with as much expedition as possible, and the rules of evidence would not apply.⁵¹ As indicated above, participation in the process would be voluntary for all parties.⁵² Mediation sessions would be privileged and secret, with assurances of confidentiality being provided via legislative provision in amendments to the Act.⁵³ Participating in

⁴³ L Street, ‘The Language of Alternative Dispute Resolution’ (1992) 3 *Australian Dispute Resolution Journal* 144, 146.

⁴⁴ See Astor and Chinkin, above n 40, 158-160 on the issue of the importance of capacity and willingness of parties to participate in the process.

⁴⁵ Street, above n 43, 146.

⁴⁶ Ibid.

⁴⁷ Mediations conducted by the Centres take place pursuant to the *Dispute Resolution Centres Act 1990* (Qld).

⁴⁸ For more detail on interest-based problem solving techniques see R Fisher and W Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random House Business Books, 1999).

⁴⁹ Boule, above n 31, 29.

⁵⁰ Ibid 30.

⁵¹ *Dispute Resolution Centres Act 1990* (Qld) ss 29 (2), (3).

⁵² *Dispute Resolution Centres Act 1990* (Qld) ss 31(1), (2).

⁵³ *Dispute Resolution Centres Act 1990* (Qld) ss 36(4) and (5) provide that documents prepared for the purposes of a mediation, and evidence of anything said or of any admission made in a

a mediation would also not affect the complainant's or the agency's legal rights or remedies in relation to the substance of the complaint.⁵⁴

The proposed model⁵⁵ would begin with the mediator giving a detailed introduction to the principles and practice of mediation and establishing a number of ground rules for the participants.⁵⁶ In particular, the mediator would emphasise their independence and the fact that they will not make a decision in relation to the complaint. Importantly, in the context of the IGIS's office, an officer who works as the mediator on a matter would not then be able to conduct an investigation into that same matter if the mediation were unsuccessful.

Once the mediation commences the complainant and the agency would each be given the opportunity to explain their concerns and issues in relation to the complaint without interruption. The mediator would then summarise these concerns and issues in objective, neutral language and help to construct an agenda to provide a focus for communication between the participants. This agenda is used by the mediator to systematically assist the participants to communicate directly with each other and to explore each of the issues. It should be emphasised, that in this process of exploration, because of the flexibility of the process, if an agency becomes concerned about whether they can discuss a particular matter, it is possible for a break to be taken and for further advice or authority to be sought.

A private session also usually takes place after all the issues on the agenda have been explored. In this session the mediator meets with each party privately to discuss their perspective on progress in the mediation. This session is confidential and gives each participant an opportunity to speak freely and openly to the mediator about any concerns they may have about the process, its conduct, or the participation of the other party.

Private sessions also provide an opportunity for the agency representative to canvass security issues that may be relevant to the conduct of the mediation. And at this point the agency representative would be in a position to 'reality-test' with the mediator whether the agency is going to be able to meet the needs or demands of the complainant. For example, an agency representative could consider the feasibility of proposing possible policy changes to their organisation's operational practice, or develop a recommendation for a direction to the agency's officers about conduct when on operations. The flexibility of the mediation process also allows agency representatives time to consult with their organisation on such changes.

mediation session is not admissible in any proceedings before any court, tribunal or body, except where the parties agree. Section 37 provides that mediators must take an oath or affirmation of secrecy.

⁵⁴ *Dispute Resolution Centres Act 1990 (Qld)* s 31(4).

⁵⁵ This process follows, in basic terms, the seven stage process for mediation outlined by J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey-Bass, 1984). The process is based on a two-mediator cooperative model but can be used by solo mediators also.

⁵⁶ For example, that only one person speaks at a time, or that appropriate language is to be used. Folberg and Taylor also list a number of behavioural guidelines that should be established prior to a mediation commencing, for example, agreement on time-frames for the session, rules preventing attribution of motives or slanderous statements, rules regarding interruptions, procedures for taking breaks etc: Above n 55, 157.

Negotiations between the participants continue after the private sessions with the mediator assisting them to focus on developing options for reaching consensus on resolving the complaint. These options are explored and, finally, proposals between the participants are crystallised (usually but not necessarily) with a written agreement and closing statements from the mediator.

IV KNOWING WHEN MEDIATION IS APPROPRIATE FOR COMPLAINTS MADE TO THE IGIS

A critical issue for the success of mediation as an approach to complaints against the AIC will be the selection of appropriate complaints for diversion to the mediation process.⁵⁷ Clearly the model of mediation proposed here will not be appropriate for the resolution of all matters that come to the IGIS. In particular, allegations of illegality in the operations of an agency should be formally investigated and, in some instances even referred on to the police.⁵⁸ Issues, for example in relation to warrant operations, procedures and violations, or unauthorised telephone interception, involve concerns about legal propriety that relate to public confidence in the operations of the AIC. Complaints about these sorts of issues require formal investigations with formal, public conclusions and action.

Intelligence organisations will also be concerned that the mediation process does not have the potential to compromise security. In the case of the Australian Security Intelligence Organisation (ASIO) for example, these concerns generally focus on where information could compromise *modus operandi*, prejudice current operations, reveal the existence or identity of past or current sources, agents and ASIO officers or endanger foreign liaison.⁵⁹

The office of the IGIS would need to develop a screening process that would ensure, for example, that matters pertaining to issues of illegality or matters that are potentially sensitive in terms of security, are simply never recommended for mediation. These matters would follow the usual formal inquiry processes outlined above in Section II.

Not all complaints received by the IGIS relate, however, to action on the part of an agency that is illegal; and not all complaints involve issues where an agency's participation in a mediation will compromise organisational or national security. Justified grievances may equally well arise, for example, where an agency 'has acted inconsiderately or unfairly or where it has misled the complainant or treated the complainant badly'.⁶⁰ Matters of this kind might include mistakes of judgment in complying with collection or reporting guidelines or with the new privacy rules,⁶¹ or inappropriate conduct in investigations on the part of agency officers. For example, allegations of violating the modesty of Muslim women were made in relation to a joint

⁵⁷ Folberg and Taylor comment that 'mediation can be applied to diverse conflicts and disputes ... the uses of mediation as a participatory, problem-solving approach are infinite': Above n 55, 190-191.

⁵⁸ For example, see the *IGIS Annual Report* at 44 where a complaint is detailed that included allegations against ASIO of property theft. This was referred by the IGIS, with the agreement of the Director-General of ASIO, to the police with supervision by the Commonwealth Ombudsman.

⁵⁹ *ASIO Annual Report 1997-98*, 28-29.

⁶⁰ Wade and Forsyth, above n 12, 87.

⁶¹ See *IGIS Annual Report*, 27-28.

ASIO/AFP operation where a woman in a house being raided was not allowed to put on a head scarf during the raid.⁶²

These types of complaints do not necessarily fit into the regular formal moulds for investigation, but are nonetheless real.⁶³ 'A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country'.⁶⁴ It is not adequate to say that these sorts of matters can be constitutionally dealt with through complaints made to Members of Parliament which then become a parliamentary question.⁶⁵ Mediation offers a way to address these complaints effectively for the benefit of both the agency and the complainant.

V POSITIVE ASPECTS OF MEDIATING COMPLAINTS ABOUT INTELLIGENCE ORGANISATIONS

There are many significant positive aspects of the mediation model proposed here for the resolution of complaints relating to the AIC. These advantages exist for both the relevant agencies and the complainants and are discussed below in terms of these two perspectives. The advantages also exist in terms of the perspective of the promotion of democratic and just administrative practices of government, as noted above. This is particularly important in the current environment where Australia's Intelligence organisations require as much cooperation as possible from the public, not antagonism resulting from discontent about administrative practice.⁶⁶

A *Positive Aspects of Mediation for the AIC*

From an organisation's perspective, the key advantage of the mediation process is that it enables their representative to communicate the agency's responses to the complaint directly and effectively to the complainant. Formal modes of inquiry and investigation simply do not offer an agency the opportunity to explain aspects of their activities, contextualise their conduct, or acknowledge minor improprieties. In this way, the mediation process provides an opportunity to enhance the public view of organisational accountability.

There are also the advantages of efficiency and speed. Efficiency is achieved in terms of resources and time, and potential benefits exist for both the office of the IGIS and the

⁶² C Kremmer, 'When ASIO calls ...', *Sydney Morning Herald* (Sydney), 22 February 2002 <www.old.smh.com.au>. Some of the detail relating to this complaint is also presented in the IGIS Annual Report, 44.

⁶³ Wade and Forsyth, above n 12, 87.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Discontent with the operations of Intelligence organisations is something that is, however, being promoted by aspects of the media. See, for example, M Carlton, 'This Melodrama Can Get Right Up Your Nose', *Sydney Morning Herald* (Sydney), 2 November 2002, <www.smh.com.au/articles/2002>; J Kidman, 'ASIO Swoop in Hunt for bin Laden Link', *Sydney Morning Herald* (Sydney), 30 September 2001, <www.old.smh.com.au/news>; D Marr, 'Interrogation Traumatic', *Sydney Morning Herald* (Sydney), 29 September 2001, <www.old.smh.com.au/news>. A good example of effective cooperation with the community was the community contact program developed by ASIO in the lead up to the 2000 Sydney Olympics.

relevant Intelligence organisation.⁶⁷ That is, it is far less resource intensive for the office of the IGIS to devote an officer to an afternoon of mediation than to weeks of investigation and enquiry. It is also far less resource intensive for an agency to prepare for a mediation than to respond to formal requests for briefings and memos in response to a complaint. Further, where the parties are cooperative, a mediation can be organised within days, and this offers the consequential possibility of having the matter resolved in that time.

It is also a benefit for agencies that the mediator under this model, being someone from the office of the IGIS, has a level of independence that is combined with a knowledge of the issues and the context of the dispute. Whilst the mediator's role is proposed to be one of low level intervention on matters relating to the substance of the complaint, the flexibility of the process can allow for their expertise to be drawn on where appropriate. This is a matter that warrants further consideration as the model is developed.⁶⁸

The mediation model proposed here conforms to traditional principles of confidentiality and privacy.⁶⁹ This is generally taken to mean that mediations are conducted behind closed doors, that no record of what is said is kept, and there is no disclosure outside the mediation context of documents relied on or of discussions that took place, unless both parties agree.

Further, confidentiality is generally taken to ensure that mediation proceedings are conducted 'without prejudice'. That is, if a complainant decides to pursue a matter further, formally, they are unable to use what was said in the mediation in relation to those later proceedings. This, we would suggest, is a significant benefit to an agency, as it can allow them a higher level of latitude to engage fully in discussions with the complainant. As suggested above, security concerns specific to Intelligence organisations remain an issue for consideration. However, the voluntary nature of mediation means that an agency can discontinue their participation in the process at any stage where it appears to the representative that it would be inappropriate to continue. Further, any documents prepared by the agency for the purpose of the mediation would be protected by the confidentiality provisions of amendments to the Act and would not be able to be called for use in any later proceedings.

⁶⁷ Note that the only physical resources required for a mediation are a quiet room with tables and chairs and a whiteboard. Access to tea, coffee, water and tissues is also usually required. Moore, however, comments that the location needs to be neutral so that neither party has 'strong emotional identification or physical control of the space'. CW Moore, *The Mediation Process* (Jossey-Bass, 1996) 148. Moore discusses issues to do with the physical arrangement of the setting further at 150-152.

⁶⁸ Note that the issue of independence and neutrality on the part of a mediator is highly contentious. See, for example, H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part I' (2000) 11 *Australian Dispute Resolution Journal* 73; and R Field, 'The Theory and Practice of Neutrality in Mediation' (2003) 22 *The Arbitrator and Mediator* 79. Confusion about this issue can be avoided if it is overtly addressed in the development of the mediation model for the IGIS and included in mediator training and guidelines. Also, the parties must be fully advised at the beginning of the mediation as to the extent of the mediator's role.

⁶⁹ See Boulle, above n 31, 41, and Astor and Chinkin, above n 40, 178-186. Note however Codd's comment that 'the current case law would suggest that one should not assume confidentiality in mediation': B Codd, 'The Confidential Mediator' (2002) 21 *The Arbitrator and Mediator* 35, 36. Our proposal is that any model of mediation developed for use by the office of the IGIS would have its confidentiality formally protected by amendments to the *Dispute Resolution Centres Act 1990* (Qld) – see above n 51.

Another benefit of mediation from an agency's perspective is that it 'can be directed, not toward cementing a relationship, but toward terminating it'.⁷⁰ That is, through mediation, communication with the complainant can be achieved to a level where they have no interest in becoming a repeat complainant. In this way, the mediation process has the potential to secure the complainant's confidence, and prevent future complaints.

In summary, agencies potentially have much to gain by participating in a mediation about a complaint against them. They can save time and resources by having the issue dealt with expeditiously and effectively; they can uphold the integrity of the operations of their officers whilst also having a chance to acknowledge any deficiencies in agency practice or procedure; and they can do so in a confidential environment where their communications with the complainant are facilitated by a knowledgeable independent.

B *Positive Aspects of Mediation for Complainants*

From the perspective of complainants, perhaps the most significant advantage is that they are able to put their issues directly to the relevant agency in a controlled environment.⁷¹ Complainants can feel – at least to a certain extent - that they contribute to the direction of discussions in the mediation and that their story and concerns have been heard. They are also more likely, as a result of the personal connection they are able to make with a human representative of the relevant agency, to drop any pretences or hidden agendas they might bring to the mediation, and this allows discussions to be more open and constructive.⁷²

The complainant's direct face-to-face participation and personal engagement in exploring the issues contributes to their overall satisfaction with the process, to an understanding of the agency's point of view and to a commitment to any agreed outcomes.⁷³ The fact that the process directly involves the complainant in arriving at a consensual outcome means that, for example, a verbal apology from the agency representative at the time of the mediation may be deemed sufficient and satisfactory to address their concerns. This of course avoids any need for subsequent formal recommendations from the IGIS. Even where the mediation results in a recognition that the complaint is without substance, the process itself is likely to result in greater satisfaction and closure for the complainant.

The informal nature of the mediation process is another benefit to complainants and is closely linked to its flexibility.⁷⁴ Informality in relation to mediation refers to 'the setting, style and tone of the mediation and the interpersonal behaviour and conduct of the participants'.⁷⁵ The mediation process specifically lacks mystique and ritual, and the language of the process is also natural and everyday. This makes the process one that is easy for complainants to understand and creates a non-threatening environment which is

⁷⁰ L Fuller, 'Mediation' (1971) 44 *Southern California Law Review* 305, 308.

⁷¹ Boule, above n 31, 37.

⁷² See generally, for example, R Baruch Bush and J Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1994). See also Folberg and Taylor, above n 55, 231-243 on the issue of uncovering hidden interests of the disputing parties.

⁷³ Moore, above n 67, 309: 'Satisfaction can generally be correlated with compliance'. See also, R Singer, 'The Rolling Stones Revisited: Exploring the Concept of User Satisfaction as a Measure of Success in Alternative Dispute Resolution' (1995) 6 *Alternative Dispute Resolution Journal* 77.

⁷⁴ Boule, above n 31, 36.

⁷⁵ Ibid.

user-friendly.⁷⁶ The flexibility of the process also means that it can take place at a convenient time and place for the complainant.

A consequence of the informal nature of the process is that issues can be raised and discussed that might not necessarily be relevant to a formal investigation.⁷⁷ For example, a complainant's feelings and emotional responses to having their house raided can be acknowledged by the agency, discussed and explored.⁷⁸ The process also provides the opportunity for complainants to contribute to a process of prioritising issues so that the discussions can cut straight to the core matters that are important to them.⁷⁹ This might mean, for example, that an off-the-cuff offensive remark made by an agency officer during a raid is given priority as an issue to be resolved for the complainant over an issue of alleged damage to property.

Another advantage for complainants of the mediation model suggested here is its voluntary nature;⁸⁰ that is, a complainant can terminate the process at any stage. This allows the assumption to be made that as long as the complainant remains in the mediation room, they are committed to discussing issues with a view to finding a resolution, as they are under no other compulsion to remain.

As noted above, the mediation model proposed here conforms to traditional principles of confidentiality and privacy. This is important for complainants for a number of reasons. First, an assurance of confidentiality increases the likelihood that the complainant will be willing to engage in the process.⁸¹ Second, it allows complainants to feel that they can talk openly and honestly, without any fear of reprisal for what they say; and this enhances the effectiveness of the process.⁸² Third, confidentiality works to suppress ulterior motives in terms of participation; that is, complainants cannot use the process as a 'fishing expedition' for intended later proceedings.⁸³ And finally, their issues and concerns are kept out of the public eye, and they can therefore avoid undue attention and embarrassment.

Another benefit is that speedier resolutions to complaints are possible because mediations can be organised quickly and, if they result in an agreement, avoid the need for a formal investigation. Complainants are consequently more likely to feel that the system has been respectful of them by dealing with their concerns expeditiously.

⁷⁶ Ibid.

⁷⁷ Astor and Chinkin note: 'The mediator seeks to ensure that the agenda is comprehensive, is based on the parties' concerns rather than the ideas or concerns of the mediator, and is expressed in language which accurately identifies those concerns without expressing unproductive blaming or conflict'; Above n 40, 143.

⁷⁸ As Tillett comments: 'Feelings almost inevitably play an important part in conflict and conflict resolution, and the mediation process. Resolutions that appear to involve no expression of feeling are usually those which will not succeed': G Tillett, *Resolving Conflict: A Practical Approach* (Oxford University Press, 1991) 58.

⁷⁹ See Folberg and Taylor, above n 55, 223-227 for a discussion of the various methods for forming a constructive agenda.

⁸⁰ For a discussion of the arguments relating to voluntariness in mediation see Boule, above n 31, 15. Important to a model of truly voluntary mediation is that a party's agreement to participate is free and informed.

⁸¹ Astor and Chinkin, above n 40, 178.

⁸² Ibid, also referring to NSW Law Reform Commission, *ADR – Training and Accreditation of Mediators*, Report No 67 (1991) 63.

⁸³ Astor and Chinkin, above n 40, 178.

A final advantage of the mediation process for complainants is that participation in it does not preclude their turning to formal options if the mediation is not successful.

Complainants, then, as well as agencies can clearly benefit from having their matter referred to mediation. Not only do they have the chance to be heard by the relevant agency through their direct participation, but they also have the opportunity to better understand what happened and why. Complainants can help determine the relevant issues to be discussed and the order of their priority and can also contribute to working out what needs to be done to resolve the complaint, and address their issues of concern. This can all take place in an environment which is informal, flexible and relatively non-threatening where their privacy is assured and where their communications with the agency are facilitated by an independent authoritative mediator.

VI A CRITICAL ASSESSMENT OF MEDIATION IN THE CONTEXT OF THE IGIS

Mediation is a process that can potentially resolve many complaints in a very positive way — but it needs to be assessed critically. Certainly, many proponents of mediation believe that its ‘advantages clearly outweigh its disadvantages’.⁸⁴ Nevertheless there are some negative aspects of mediation that apply to the resolution of complaints, even where they are appropriate for the process. Further, while there are certainly many possible advantages of mediation not all of them apply to all complaints or complainants. For this reason the development of an appropriate screening process in the office of the IGIS will be essential to the success of mediation in this context.

Justice Kirby has commented that it is important to avoid the mythology of mediation.⁸⁵ The asserted benefits of mediation, discussed above, need therefore to be contextualised by a thorough consideration of theoretical and practical issues of concern. These include: doubts as to whether the process can adequately safeguard the rights and interests of certain parties, particularly those who are at a power disadvantage;⁸⁶ questions about the institutionalisation of second-class justice based on economic exigencies;⁸⁷ the dependence of the process on the skill levels of the mediator;⁸⁸ and the practical and real consequences of theoretical assertions relating to mediator independence and confidentiality in the mediation process.⁸⁹

It should also be noted, for example, that although mediation is ostensibly voluntary some complainants may feel forced to attend;⁹⁰ although mediation should be flexible, some

⁸⁴ For example, PL Winks, ‘Divorce Mediation: A Non-Adversary Procedure for the No-Fault Divorce’ (1980-1981) 19 *Journal of Family Law* 615, 653.

⁸⁵ See Kirby, above n 36, 146; G Tillett, *The Myths of Mediation* (The Centre for Conflict Resolution, Macquarie University, 1991); and GV Kurien, ‘Critique of Myths of Mediation’ (1995) 6 *Australian Dispute Resolution Journal* 43.

⁸⁶ However, it has been said that ‘[t]hose involved [with the general interest in mediation] seem more fascinated with the concept than with its practical application.’: Charlesworth, above n 37, 59.

⁸⁷ See, eg, R Abel (ed), *The Politics of Informal Justice* (Academic Press, 1982).

⁸⁸ As Tillett comments: ‘The key variable in mediation is not the nature of the conflict or its participants. It is the mediator, who must possess appropriate personal and process skills’: Tillett, above n 78, 51.

⁸⁹ See above n 51 and 66.

⁹⁰ Boule, above n 31, 16 comments that there are ‘gradations of voluntariness’. This means that a choice to participate may not reflect a genuine willingness to attend.

mediators are not skilled enough to cope with the process demands of the parties;⁹¹ some mediations take a very long time and are not speedy at all; some complainants may come to the process with strong patterns of destructive conflict resolution behaviour that are not possible to counter; some may have less respect for the outcome of mediation than for the result of a formal investigation; and if a mediation is handled badly it may compound the issues for the complainant and exacerbate the complaint. In short, 'it must be acknowledged that mediation is not a universal panacea'.⁹²

The authors propose to consider these issues, and their relevance to the resolution of AIC related complaints, in more detail in a second article. However, one issue is particularly relevant to any mediation involving the AIC and warrants some elaboration here.

A major concern about mediation relates to its use in situations where there is a power imbalance between the parties. This is because in mediation both parties need to be able to negotiate on their own behalf effectively, and if there is a power imbalance one party will have a negotiating advantage that will almost certainly result in the outcome being (perhaps unfairly) in their favour. In terms of mediations conducted by the IGIS, a clear power imbalance exists between the complainant and the agency. That is, the agency representative, coming from a government organisation with considerable authority and legislative power, has significant potential to dominate discussions and overbear or intimidate the complainant. This sort of intimidation is not necessarily always overt and yet can impact strongly on the outcome of the process.

It is also worth noting, in particular, that there are often potential cultural issues that impact on the balance of power between the complainant and the relevant agency. For example, some of the people that the AIC deals with originate from countries where security organisations are not monitored and have enormous power. These organisations are consequently a source of fear, and this fear can be translated to a complainant's discussions with an agency in the mediation environment.

If issues of power imbalance are openly acknowledged, however, prior to the development of the IGIS model of mediation, then they can be addressed to some extent by ensuring that the mediator has an ability to intervene in the process when the existence of a power imbalance seems to be impacting on the complainant's ability to engage in the process effectively. On a practical level, for example, a mediator can use strategies such as breaks from discussions, or private sessions, in order to assist the complainant to regain their composure or to give them quiet time to consider proposed options for resolving the complaint.⁹³

A complicating factor here, however, is that mediator interventions on behalf of the complainant can be argued as compromising their independence, and this can potentially undermine a key benefit of the process. Nevertheless, the flexibility of the mediation

⁹¹ Kurien refers to the parties reliance on the mediator's ability to 'adapt the process to suit the individual needs of the parties in conflict': G Kurien, 'Critique of the Myths of Mediation' (1995) 6 *Australian Dispute Resolution Journal* 43, 50. Mediator skills in this regard are not always consistent in standard, although thorough training procedures and continuing skill evaluation can address some of the issues that arise in this context.

⁹² Charlesworth, above n 37, 60.

⁹³ See, for example, AM Davis and RA Salem, 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' (1984) 6 *Mediation Quarterly* 17.

process allows for accommodations to be made in this regard, and as long as the participants are fully informed about what is appropriate mediator conduct, problems can be avoided. It is important, for example, for the participants to be clear that whilst mediators may be able to control aspects of the process to assist them, they are not in a position to advise complainants of their legal rights, or to assess for them the relative merits of a particular proposal or option. It is also important that complainants are advised before the mediation commences that they should seek independent legal advice if they are unsure of, or concerned about, the legal consequences of any of the issues or proposals discussed.

Despite the possible negative aspects of the use of mediation in the context of complaints about the AIC, there is much to be said for considering a trial program. The next section provides a brief case study to illustrate how the process might work in practice to resolve an appropriate complaint.

VII A CASE STUDY

ASIO is perhaps an agency for which the model of mediation proposed in this article is particularly suitable. This is because, as the IGIS has noted, 'as ASIO is principally a domestic security agency, it is the agency most likely to come into contact with members of the Australian public'.⁹⁴

The following detail of a complaint against ASIO that shows potential for the use of mediation is taken from the IGIS's Annual Report for 2001-2002:⁹⁵

The Complaint:

The IGIS received a complaint from the mother of a university student interviewed by ASIO. The interview was viewed by ASIO as routine. The complainant was concerned, however, about the agency's practice in terms of organising the interview, where an ASIO officer obtained a contact number from a family member without declaring he was from the organisation. The complainant was also concerned about the conduct of the interview itself (which she attended with her son), where she said they both felt intimidated and threatened by the ASIO officers.

The IGIS concluded that the ASIO officers involved were not clear on how the activity related to ASIO's statutory responsibilities. The Director General of ASIO, Dennis Richardson, had similar concerns and assured the IGIS that he had already taken action to avoid a re-occurrence and 'to remind ASIO officers seeking assistance from the public that they must ensure their activities are at all times consistent with ASIO's roles and functions and sensitive to community concerns'.⁹⁶

A Mediated Approach:

This is a complaint that predominantly involves issues of agency practice and procedure. It would be suitable for a mediated approach to its resolution because the concerns do not involve any illegal conduct on the part of the agency, or any issues of

⁹⁴ IGIS Annual Report, 31.

⁹⁵ Ibid 44.

⁹⁶ Ibid.

a particularly sensitive nature. Rather, the issues centre on a complainant's assertion of insensitive officer conduct and a lack of clarity on the part of the officers involved about the purpose of the exercise in which they were engaged, and how that exercise related to ASIO's statutory functions.

In a mediated environment, an ASIO representative would be able to directly acknowledge any insensitivities on the part of the officer and discuss the general role of ASIO and the nature of its authority and powers in terms of consulting with the community. The representative would be able to contextualise the exercise that involved the complainant's family, and explain the agency's concern with groups who engage in issue motivated violence. The representative could also assure the complainant that ASIO is not concerned with making inquiries into community attitudes generally, and (if appropriate, as it was in this case) assure the complainant that 'ASIO had, and has, no ongoing interest in her son or other members of her family and does not keep a file or dossier on him'.⁹⁷ Other aspects of ASIO's usual practice and procedure could also be explained, for example, that ASIO representatives do not usually identify themselves as ASIO officers to third parties, and that one of the reasons for this practice is to 'protect the confidentiality of people with whom ASIO has contact'.⁹⁸

For the complainant, perhaps the most significant issue was the feeling of fear and intimidation she and her son experienced in their contact with the organisation. Mediation would provide her with an opportunity to discuss the extent and impact of these feelings with the agency representative. The agency representative could directly acknowledge the complainant's experience and assure her that 'ASIO had no intention of intimidating her son, or investigating his legitimate protest activities'.⁹⁹

With these issues carefully explored, using the process detailed in Section III above, the complainant and the agency representative would be in a position to move to a resolution of the matter. It is likely that for the complainant a verbal apology and statement of reassurance that ASIO has no ongoing interest in her son or family would be sufficient. It might also be the case that the agency representative could assure the complainant that the agency will look to review their community consultation procedures.

At the conclusion of the mediation the mediator would write, with the assistance of the participants, a summary of what had been agreed and this would form the basis of a brief report to the IGIS on the issues addressed in the mediation and the outcomes of the process.

VIII CONCLUSION

This article has shown that there is much potential for the use of mediation in the resolution of complaints about the AIC. The benefits of mediation, when applied to appropriate cases, extend from resource savings for both the IGIS and agencies to broader issues of public interest promotion and increased accountability of Intelligence organisations. In the current security environment it is likely that complaints to the IGIS against the AIC will increase. These complaints need to be

⁹⁷ Ibid, these were issues explained by the IGIS to the complainant.

⁹⁸ Ibid.

⁹⁹ Ibid.

resolved in a way that maintains public confidence in, and promotes accountability of, the AIC. Current formal inquiries are thorough but resource intensive, and exclude the direct participation of the relevant agency and the complainant. The introduction of mediation into the complaints resolution practice of the office of the IGIS offers the potential to address these issues with advantages to complainants, agencies and the office itself.

Moving the IGIS' complaints resolution practice forward in this way will be critical to Australia's acceptance of a higher public profile for the AIC in this Century.