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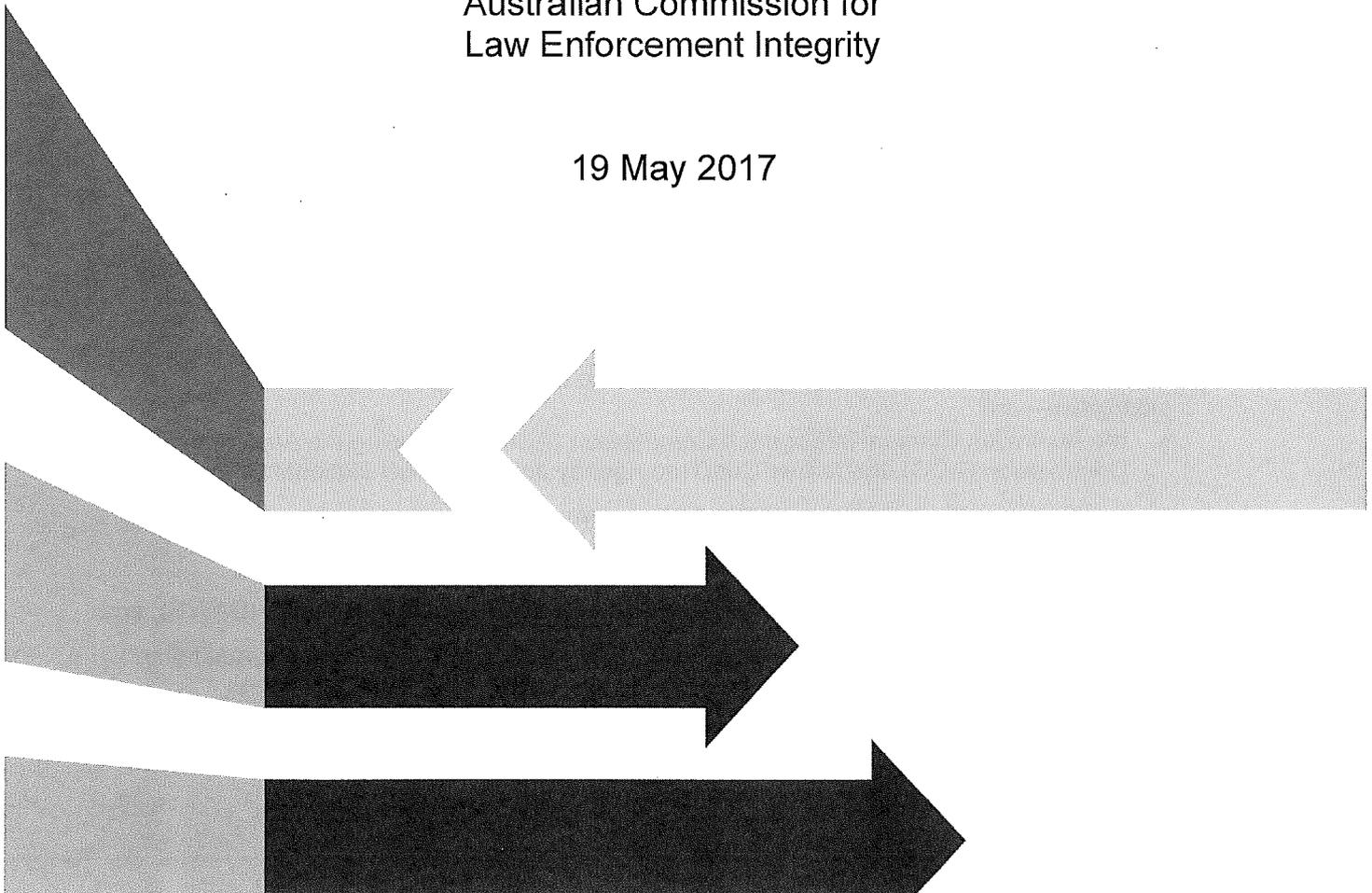
Australian Government
**Australian Commission for
Law Enforcement Integrity**



ACT LEGISLATIVE ASSEMBLY
**SELECT COMMITTEE ON AN
INDEPENDENT INTEGRITY COMMISSION**

Submission by the
Australian Commission for
Law Enforcement Integrity

19 May 2017



1. INTRODUCTION

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Select Committee on an Independent Integrity Commission.

ACLEI is the only Australian Government agency dedicated solely to the prevention, detection and investigation of corrupt conduct. With a statutory focus on those agencies with law enforcement functions that operate in high-corruption risk environments, ACLEI has a special role in the Australian Government's multi-agency anti-corruption framework.

To assist the Committee:

- Part 2 of this submission provides an overview of ACLEI (which may be of general interest as to institutional design and corporate strategy), and
- Part 3 raises some specific issues for the Committee's consideration.

Unless otherwise stated, references to legislation or Ministers relates to the Commonwealth jurisdiction.

2. OVERVIEW OF ACLEI

Establishment

The office of Integrity Commissioner, and ACLEI, are established by the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). The objects of the LEIC Act (at section 3) are:

- (a) *to facilitate:*
 - (i) *the detection of corrupt conduct in law enforcement agencies and*
 - (ii) *the investigation of corruption issues that relate to law enforcement agencies and*
- (b) *to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following those investigations and*
- (c) *to prevent corrupt conduct in law enforcement agencies, and*
- (d) *to maintain and improve the integrity of staff members of law enforcement agencies.*

ACLEI's strategic purpose—through performance of functions prescribed by the LEIC Act—is to make it more difficult for corruption in law enforcement agencies to occur or remain undetected. The LEIC Act provides the basis for ACLEI's purpose and activities.

The LEIC Act agencies—those agencies subject to the Integrity Commissioner's jurisdiction—are:

- the Australian Criminal Intelligence Commission (ACIC)—including the Australian Crime Commission (ACC), the former CrimTrac Agency and the former National Crime Authority
- the Australian Federal Police (AFP), including Australian Capital Territory Policing
- the Australian Transaction Reports and Analysis Centre (AUSTRAC)
- prescribed aspects of the Department of Agriculture and Water Resources (DAWR), and
- the Department of Immigration and Border Protection (DIBP), including the Australian Border Force (ABF).
- Other agencies with law enforcement functions may be added by regulation.

ACLEI's role

ACLEI's primary role is to detect and investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. Subject to procedural fairness requirements, the Integrity Commissioner may make administrative findings about the conduct of individuals.

When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws or administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for changes.

The Integrity Commissioner must consider the nature and scope of corrupt conduct revealed by investigations, and report annually on any patterns and trends concerning corruption in law enforcement agencies.

Under section 71 of the LEIC Act, the Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following:

- a corruption issue or issues
- an issue about corruption generally in law enforcement agencies, or
- an issue or issues about the integrity of staff members of law enforcement agencies.

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Justice is responsible for ACLEI.

Impartial and independent investigations are central to the Integrity Commissioner's role. Although the Minister may request the Integrity Commissioner to conduct public inquiries, the Minister cannot direct how inquiries or investigations will be conducted.

The LEIC Act contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference and maintain an independent relationship with government agencies. Accordingly, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily
- is appointed for up to five years, with a maximum sum of terms of seven years
- can commence investigations on his or her own initiative, and
- can make public statements, and can release reports publicly.

Receiving and disseminating information about corrupt conduct

The LEIC Act establishes a framework whereby the Integrity Commissioner and the relevant agency heads can prevent and deal with corrupt conduct jointly and cooperatively. The arrangement recognises both the considerable work of the agencies in the Integrity Commissioner's jurisdiction to introduce internal corruption controls (including detection and deterrence-focussed mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staff members.

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency— also known as *mandatory reporting*.

The LEIC Act also enables any other person—including members of the public, other government agencies or the Minister—to refer a corruption issue to the Integrity Commissioner.

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to receive information about any corruption issue involving an agency within the LEIC Act jurisdiction that may be identified by other integrity agencies or law enforcement agencies as a result of their telecommunications interception activities.

Special legislative arrangements make it lawful for ‘whistleblowers’ to provide information about corruption direct to ACLEI. The LEIC Act provides for ACLEI to arrange protection for witnesses.

The Integrity Commissioner may disclose information to the head of a law enforcement agency or other government agency if satisfied that it is appropriate to do so, having regard to the functions of the agency concerned.

The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988*, reflecting the importance of ACLEI’s information collection and intelligence-sharing role.

To safeguard information—for instance to protect a person’s safety or reputation from unfair harm—the LEIC Act establishes comprehensive confidentiality requirements for ACLEI staff.

Investigation options

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI’s jurisdiction.

The Integrity Commissioner is not expected to investigate every allegation or information about corruption that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner’s role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed appropriately.

The Integrity Commissioner can choose from a range of options in dealing with a corruption issue. The options are to:

- investigate the corruption issue
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI) and to report findings to the Integrity Commissioner
- refer the corruption issue to the AFP (if the corruption issue does not relate to the AFP)
- investigate the corruption issue jointly with another government agency or an integrity agency for a state or territory, or
- take no further action.

Under the LEIC Act, the Integrity Commissioner must give priority to serious or systemic corruption. Section 27 of the LEIC Act also sets out criteria to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue. With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI’s direct involvement.

Accordingly, the Integrity Commissioner gives strategic priority to corruption issues that may:

- indicate a link between law enforcement corruption and organised crime
- relate to law enforcement activities that have a higher inherent corruption risk
- involve suspected conduct which would seriously undermine an agency's law enforcement functions
- bring into doubt the integrity of senior law enforcement managers
- warrant the use of the Integrity Commissioner's information-gathering powers, or
- would otherwise benefit from independent investigation.

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act. In this way, ACLEI aims to pursue those investigations which are most likely to yield the highest strategic contribution to maintaining and improving integrity in law enforcement agencies.

Investigation powers

Due to the adverse consequences of law enforcement related corruption, ACLEI has access to a range of statutory law enforcement, coercive and other powers, including:

- coercive notices to produce information, documents or things
- summons to attend a coercive information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things (or else face criminal prosecution or action for contempt)
- intrusive information-gathering (covert)
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities
 - integrity testing (in relation to the ACIC, AFP and DIBP)
 - scrutiny of financial transactions, and
 - access to specialised information databases for law enforcement purposes
- search warrants
- right of entry to law enforcement premises and associated search and seizure powers, and
- arrest (relating to the investigation of a corruption issue).

Purpose of coercive powers

Investigations of law enforcement corruption often involve suspects and witnesses who are well-versed in law enforcement methods and therefore may be skilled in avoiding or countering them to avoid detection. For instance, counter-surveillance skills, the ability to conceal activities ('hide tracks') or the capacity to divulge confidential information to others ('tip-offs') may be the commodity that makes a criminal conspiracy possible or attractive to undertake.

A particular challenge in this context is to ensure that anti-corruption investigations are able to uncover the full network of people involved—for instance law enforcement officials and their criminal counterparts—rather than stop at the point of having identified a ‘bad apple’. It is also important to seek to gain contemporary information about what methods are being exploited to compromise systems, so that ‘target hardening’ can take place.

To help meet these challenges, Part 9 of the LEIC Act establishes arrangements for the Integrity Commissioner to use coercive information-gathering powers during an ACLEI investigation or joint investigation. These powers require a person to produce documentary evidence and/or appear as a witness and answer questions truthfully at a hearing. It is an offence not to comply with a coercive notice or summons, not to answer questions (even if to do so would tend to self-incrimination), not to answer truthfully, or otherwise be in contempt of ACLEI. The Integrity Commissioner may also issue a non-disclosure direction in relation to coercive notices, summonses and any information provided. This measure assists ACLEI to continue to investigate a matter covertly.

Coercive powers are an important part of the suite of investigation powers available to the Integrity Commissioner. ‘Notices to produce’—for instance, to obtain bank account details when warranted—assist ACLEI to build an intelligence picture. Hearings—particularly when combined with other law enforcement investigation methods—enable ACLEI to further investigations that might otherwise stall through lack of conventional investigation options.

Evidence given by a witness at a hearing (ie hearing material) may not be used in a criminal prosecution against that witness, unless it falls within one of the limited exceptions set out in subsection 96(4A) of the LEIC Act—thereby protecting the privilege against self-incrimination. For instance, such material may be used in a confiscation proceedings (where the hearing occurred before the proceedings were commenced against the witness, or before such proceedings were imminent). Similarly, hearing material may be used in a disciplinary proceeding relating to the hearing witness (if the witness is in ACLEI’s jurisdiction). The privilege against self-incrimination also applies to a person who gives information, or produces documents, in response to a coercive notice.

Corruption prevention

ACLEI’s approach to preventing corruption is to work closely with LEIC Act agencies to share information and insights that might strengthen anti-corruption arrangements. For instance, ACLEI’s Corruption Prevention Practice distils intelligence from a variety of sources—including lessons learned from ACLEI operations—to identify vulnerabilities in practices and procedures of agencies. These insights also inform Commonwealth anti-corruption policy more generally.

ACLEI publishes case studies and investigation reports to its website, as well as articles designed to assist corruption prevention practitioners.

ACLEI’s resourcing

ACLEI’s maximum average staffing level (ASL) for 2017–18 is 49 ASL. Presently, 36 of ACLEI’s positions are located in Canberra, with the remaining 13 located in Sydney. Some additional resources (people and specialist capabilities) are provided to ACLEI by other agencies in the context of joint investigations or taskforces. ACLEI also purchases a number of specialist services, such as IT support and surveillance capabilities. From time to time, further resources are provided to ACLEI through secondment arrangements, at the cost of other agencies—for instance, in the context of joint operations or taskforces.

3. SPECIFIC COMMENTS

Having regard to the Inquiry's Terms of Reference and ACLEI's roles and responsibilities, the following sections respond to two key issues in the design of an ACT Integrity Commission.

ACT Policing

As noted, the Australian Federal Police (including ACT Policing) presently forms part of the LEIC Act jurisdiction.

The *Law Enforcement Integrity Commissioner Regulations 2017* specifically contemplate the interest of the ACT Government in assuring the integrity of its contracted provider of policing services, when that provider is the AFP. Accordingly, Regulation 18 establishes a mechanism for the relevant ACT Government Minister to be informed about ACLEI's activities, as follows:

18 Requirement to give information or reports

Giving information or reports in specified circumstances

(1) For the purposes of subsection 224(2) of the Act, information or reports that are required to be given under a provision of the Act prescribed in subsection (2) are also to be given to the persons prescribed in subsection (3) if:

(a) the corruption issue to which the prescribed provision relates is a relevant corruption issue in relation to the Australian Capital Territory or an External Territory; and

(b) the Integrity Commissioner:

(i) is investigating the corruption issue to which the prescribed provision relates; or

(ii) is managing or overseeing the investigation by a law enforcement agency of the corruption issue to which the prescribed provision relates.

Prescribed provisions of the Act

(2) The following provisions of the Act are prescribed:

(a) section 33;

(b) subsection 35(4);

(c) subsection 36(6);

(d) subsection 39(4);

(e) subsection 40(6);

(f) subsection 52(1);

(g) paragraph 55(1)(a);

(h) subsection 65(1);

(i) paragraph 74(a), to the extent it relates to a corruption issue;

- (j) subsection 144(6);
- (k) subsection 145(6);
- (l) subsection 147(2), to the extent it relates to a corruption issue.

Prescribed persons

(3) The following persons are prescribed:

- (a) for information or reports relating to a relevant corruption issue in relation to the Australian Capital Territory—the Minister, within the meaning of the *Australian Capital Territory (Self-Government) Act 1988*, who is responsible for exercising the power of the Australian Capital Territory Executive in relation to police matters;
- (b) for information or reports relating to a relevant corruption issue in relation to an External Territory—the Administrator of the External Territory.

Definitions

(4) A corruption issue is a **relevant corruption issue** in relation to the Australian Capital Territory or an External Territory if:

- (a) the corruption issue relates to corrupt conduct of a person while the person was a staff member of the AFP whose duties included providing police services in relation to the Australian Capital Territory or an External Territory under section 8 of the *Australian Federal Police Act 1979 (AFP Territory police services)*; or
- (b) the corruption issue relates to corrupt conduct of a person while the person is a staff member of the AFP whose duties include AFP Territory police services; or
- (c) the corruption issue relates to corrupt conduct that:
 - (i) is the conduct of a person who, at the time the corruption issue is being investigated, is a staff member of the AFP whose duties include AFP Territory police services; and
 - (ii) in the opinion of the Integrity Commissioner, affects, or is likely to affect, the person's performance of the police service functions of the agency.

Although the present arrangement arose in the absence of an ACT Integrity Commission, the system has the advantage of ensuring that the possibility of corrupt networks traversing different parts of an organisation are able to be dealt with in a seamless way.

Investigations relating to more than one jurisdiction

The LEIC Act provides for ACLEI to operate cooperatively with other agencies, including those in other jurisdictions. For instance, the need for joint investigations or information-sharing with other jurisdictions arises from time to time, such as when:

- an ACLEI investigation into the conduct of a LEIC Act agency staff member may have linkages to matters in which a State or Territory integrity or policing agency may have an interest, or
- a State or Territory public official may be seconded to work in a LEIC Act agency, and a question may arise as to the integrity of the person—in which case the “home” (or originating) agency may have an interest in which agency might investigate conduct involving the seconded official, and in knowing the outcome of the investigation.

In relation to joint investigations, section 26(2) of the LEIC Act provides:

- (6) The Integrity Commissioner may investigate the corruption issue [...] either alone or jointly with another government agency or an integrity agency for a State or Territory.

In relation to decisions about whether ACLEI or another agency (including a State or Territory integrity agency) should investigate a matter, sections 29, 30, 36 and 40 of the LEIC Act establish an appropriate framework for inter-agency coordination.

Information sharing provisions in Part 5 of the LEIC Act further enable the exchange of relevant intelligence and documentation when an investigation is commenced.

Accountability and oversight of ACLEI

A relevant consideration in the design of an anti-corruption commission is the oversight mechanisms that should be established to hold the commission itself to account. While other jurisdictions have adopted other models, ACLEI is held accountable for its use of statutory powers by a range of external bodies and measures.

Judges, Magistrates and the Administrative Appeals Tribunal

The authorities and powers of the Integrity Commissioner and ACLEI are generally open to review before the courts, as with any other government agency exercising law enforcement powers.

In addition, the following powers of the Integrity Commissioner require prior approval by a Judge, a Magistrate or a designated official of the Administrative Appeals Tribunal before they can be exercised:

- a search warrant (section 108 of the LEIC Act, Part 3–5 of the *Proceeds of Crime Act 2002*, or Part IAA of the *Crimes Act 1914* (Crimes Act))
- a warrant to use a surveillance device (*Surveillance Devices Act 2004* (SD Act))
- a warrant to intercept telecommunications or to gain access to stored communications (TIA Act)
- an order that a person deliver his or her passport to the Integrity Commissioner (section 97 of the LEIC Act), or
- an arrest warrant (section 100 of the LEIC Act).

Reports to the Attorney-General and the Minister for Justice

The use of certain powers requires reports to be made to the Attorney-General or the Minister with responsibility for law enforcement, as appropriate, and in some cases to the Parliament.

For instance, statutory reports are required under the following enactments:

- the SD Act
- the TIA Act
- Part IAB of the Crimes Act (controlled operations)
- Part IABA of the Crimes Act (integrity testing)
- Division 6, Part IAC of the Crimes Act (assumed identities), and

- Division 2, Part IACA of the Crimes Act (witness identity protection certificates).

Commonwealth Ombudsman

The Ombudsman's office may investigate complaints from members of the public about a matter of administration relating to ACLEI (under the *Ombudsman Act 1976*), or probe into disclosable conduct revealed in a report made under the *Public Interest Disclosure Act 2013*. The Ombudsman may also commence an investigation on his or her 'own motion'.

ACLEI's records of its use of certain covert powers are also subject to inspection by, and report to, the Commonwealth Ombudsman. The Ombudsman is required to report six-monthly or annually to the relevant Minister (and in some cases to Parliament) on the comprehensiveness and adequacy of ACLEI's records relating to the use of these powers.

The records that are subject to inspection relate to powers exercised under the following legislation:

- the SD Act
- the TIA Act (including retained data), and
- Part IAB of the Crimes Act (controlled operations).

Parliamentary Joint Committee

The Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJC-ACLEI) reports to both Houses of Parliament on matters relating to ACLEI.

In accordance with the LEIC Act, the PJC-ACLEI monitors and reviews the performance of the Integrity Commissioner's functions, and examines each Annual Report and any special reports produced by the Integrity Commissioner. This external scrutiny gives ACLEI a valuable external view of each year's efforts and achievements, and a basis to inform improvements to its work.

ACLEI corruption issues

ACLEI staff members have a mandatory obligation to report corruption. The LEIC Act establishes a statutory framework for the Minister to deal with allegations or information about corrupt conduct relating to the Integrity Commissioner or to an ACLEI staff member (an 'ACLEI corruption issue').

Part 12 of the LEIC Act provides that an ACLEI corruption issue must be notified to the Minister for Justice for a decision on how it is handled. For instance, the Minister may appoint a Special Investigator, who may then use the coercive powers of the LEIC Act to investigate the matter.

On conclusion of an investigation, ACLEI must provide the Minister with a report containing any findings and recommendations. Particulars of ACLEI corruption issues (including summaries of investigation outcomes and any disciplinary outcomes) are required to be published in the Integrity Commissioner's Annual Report.