



Australian Government

**Australian Commission for
Law Enforcement Integrity**

**ALRC Review of the Royal
Commissions Act
(Discussion Paper 75)**

**Submission by the
Australian Commission for
Law Enforcement Integrity
(ACLEI)**

to the

**Australian Law Reform
Commission (ALRC)**

September 2009

1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Australian Law Reform Commission's (ALRC) Review of the Royal Commissions Act.

This submission is designed to assist the ALRC by providing:

- general information about ACLEI's integrity role (section 2); and
- information about ACLEI's experience with the investigation of corruption issues using coercive and intrusive powers (section 3).

On key points, suggestions are also made for the ALRC's consideration.

2. Responsibilities and powers of ACLEI

Establishment

The office of the Integrity Commissioner, and ACLEI, were established by the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act), which commenced on 30 December 2006.

The objects of the LEIC Act 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.

Presently, those agencies subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the former National Crime Authority (NCA). Other agencies with a law enforcement function may be added by regulation.

Role

ACLEI's primary role is to investigate law enforcement-related corruption issues, and focus on detecting systemic and serious corruption. ACLEI also collects intelligence about corruption in support of the Integrity Commissioner's functions.

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

ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or the administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed.

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The Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following (s 71 of the LEIC Act):

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

Suggestion 1:

The ALRC may wish to note that section 71 of the LEIC Act provides an existing mechanism for initiating public inquiries relating to integrity and corruption in law enforcement agencies.

Receiving information about corruption

An important feature of the LEIC Act is that it requires a relevant law enforcement agency head to notify the Integrity Commissioner of any information or allegation that raises a corruption issue, irrespective of the source of that information (s 19).

The LEIC Act establishes a framework whereby the Integrity Commissioner and the agency heads can prevent and deal with corruption jointly and cooperatively. The arrangement recognises both the considerable work of the ACC and AFP 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 staffs.

Also, the LEIC Act enables the Minister to refer corruption issues to the Integrity Commissioner (s 18), as well as for any other person, including members of the public or other government agencies (s 23). The Integrity Commissioner may also deal with corruption issues on his or her own initiative (s 38).

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* to receive information about any corruption issue involving the AFP or the ACC that may be identified by other integrity agencies or police forces as a result of their telecommunications interception activities.

Investigation powers

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be well-versed in law enforcement methods, and may be skilled at countering them in order to avoid scrutiny. As a consequence, ACLEI has access to a range of special law enforcement powers.

The key investigative powers available to the Integrity Commissioner and ACLEI are:

- coercive information-gathering;
 - notices to produce information, documents or things; and
 - summonses to attend a hearing, answer questions and give sworn evidence, and/or to produce documents or things;
- intrusive information-gathering (covert);
 - telecommunications interception;
 - electronic and physical surveillance;
 - controlled operations;
 - assumed identities;
 - scrutiny of financial transactions; and

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- access to specialised information databases for law enforcement purposes;
- search warrants;
- right of entry to law enforcement premises and associated seizure powers; and
- arrest (relating to the investigation of a corruption issue).

Prosecutions, civil actions and disciplinary action

If the Integrity Commissioner, through investigating a corruption issue, discovers evidence of an offence, a liability to civil penalty, or evidence that would be admissible in a proceeding under the *Proceeds of Crime Act 2002* (or a State or Territory equivalent), the assembled evidence must be given to the AFP or to the relevant public prosecution agency.

With limited exceptions, information provided during a coercive hearing by a witness who claimed a 'direct use indemnity' is inadmissible in evidence against the person in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty. 'Direct use indemnity' applies when a person is not excused from providing information that would incriminate him or her.

Evidence about a breach of duty or misconduct which is of sufficient force that it might justify terminating the employment of, or initiating disciplinary proceedings against, a staff member of a law enforcement agency, must be provided to the head of the relevant law enforcement agency. This provision extends also to secondees, and allows the Integrity Commissioner to provide the information to a secondee's home agency.

The 'direct use indemnity' does not apply to disciplinary proceedings.

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Home Affairs is responsible for the administration of the LEIC Act.

Impartial and independent investigations are central to the Integrity Commissioner's role. An important feature of the LEIC Act is that it contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference. Accordingly, the Integrity Commissioner:

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

The Integrity Commissioner has an independent relationship with government. The Minister cannot direct how inquiries or investigations will be conducted, although the Minister may request the Integrity Commissioner to conduct public inquiries (s 71).

Suggestion 2:

The ALRC may wish to consider recommending that the proposed *Inquiries Act* include provisions for the head of an inquiry to make public statements.

3. ACLEI's experience with coercive and intrusive powers

Legal complexity

The Integrity Commissioner uses coercive information-gathering hearings on a frequent basis. In 2008-09, the Integrity Commissioner held 19 hearings in relation to seven investigations. The Integrity Commissioner is assisted in hearings by in-house counsel. To date, all hearings have been held in private.

In the same period, a total of 22 notices to produce information or documents were issued by the Integrity Commissioner in relation to six investigations (including three investigations that also included hearings).

The conduct of coercive hearings is a specialised area of legal practice, as it involves the abrogation of the privilege against self-incrimination and other privileges. The types of investigations conducted by ACLEI are likely to be unwelcome to some witnesses, and may lead to legal challenge as a form of resistance. In addition, the inquisitorial system is unfamiliar to most witnesses and their legal representatives.

So far, ACLEI investigations have not been the subject of legal challenge. Most other anti-corruption agencies and standing crime commissions have had decisions challenged in the courts. Nevertheless, the law in this area is still developing. ACLEI's legal practice monitors all relevant case law, and there is sharing between anti-corruption agencies of information about legal developments.

Match powers to complexity

ACLEI's intrusive law enforcement and inquisitorial powers are matched to the difficulty of the issues being investigated. This principle may be useful in deciding what powers should be given to a Royal Commission or to an Official Inquiry.

In ACLEI's case, the coercive hearing is the centrepiece of investigations. ACLEI uses hearings strategically, that is, decisions as to when to summons witnesses, in what order, whether to private or public hearings, are made purposively.

Hearings are most effective when used in combination with other forms of investigation, particularly physical and electronic surveillance (including telecommunications interception, amongst other methods). The ability to 'follow the money trail' by examining financial transactions is also important. Intelligence analysts play a key role in preparing information prior to hearings, as can forensic experts. Psychologists may assist prior to, during and after hearings to dissect evidence and suggest further lines of investigation.

Consideration also needs to be given to practical, tactical and legal issues such as protecting witnesses from threat of harm, and assisting witnesses to 'roll-over' to provide evidence against co-offenders.

The exercise of intrusive, covert powers in conjunction with coercive hearings requires considerable experience, and the establishment of systems and cooperative arrangements to support their effectiveness. It would be inadvisable for Inquiries to be given these types of powers without strategic and technical support.

In appropriate circumstances, ACLEI may be a useful resource to Royal Commissions and Official Inquiries, as to investigative strategy and specialised legal issues.

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Suggestion 3 (ref ALRC Question 5-1):

The ALRC may wish to consider recommending that the proposed *Inquiries Act* might include provisions for inquiries to seek technical assistance from, or second, ACLEI staff members.

The Integrity Commissioner's investigations may involve covert methods. Accordingly, there is a need to protect investigations from compromise. Under the LEIC Act, summonses may attract a prohibition against disclosure of information where notated to that effect (s 91), and evidence elicited in hearings may be protected from disclosure by confidentiality directions made by the Integrity Commissioner (s 90).

Suggestion 4 (ref ALRC Question 11-1):

The ALRC may wish to consider recommending that the proposed *Inquiries Act* might include measures that would allow an inquiry member to prohibit the disclosure of the existence of a notice, a summons or a matter connected with it (cf sections 90 and 91 of the LEIC Act). The arrangement could be that the grant of this type of power may be determined on a case by case basis by the initiator of the inquiry (the Governor-General or the Minister).

Information sharing

There may be occasions where it would be appropriate for the Integrity Commissioner to volunteer information to a Royal Commission or to an Official Inquiry. An amendment to the LEIC Act would facilitate this exchange.

Suggestion 5 (ref ALRC Proposal 11-8):

The ALRC may wish to consider recommending that sub-section 208(3) of the *Law Enforcement Integrity Commissioner Act 2006* be amended to allow the Integrity Commissioner to give information to an inquiry member under the proposed *Inquiries Act*.

There may also be occasions when it would be beneficial for a person inquiring under the proposed *Inquiries Act* to volunteer information to ACLEI regarding a corruption issue.

Suggestion 6 (ref ALRC Proposal 11-8):

The ALRC may wish to consider recommending that Royal Commission and Official Inquiries be empowered to communicate information to the Integrity Commissioner that relates to a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006*.