



Australian Government

Australian Commission for
Law Enforcement Integrity

**Inquiry into the operation of the
*Law Enforcement Integrity
Commissioner Act 2006***

**Submission by the
Australian Commission for Law
Enforcement Integrity (ACLEI)
to the Parliamentary Joint
Committee on ACLEI**

July 2009

1. Introduction

Context

The Integrity Commissioner welcomes the opportunity to make a submission to the Parliamentary Joint Committee on ACLEI (the Committee) regarding its *'Inquiry into the operation of the Law Enforcement Integrity Commissioner Act 2006'*.

In its consideration of the Law Enforcement Integrity Commissioner Bill (the LEIC Bill) and associated legislation in May 2006,¹ the (then) Senate Legal and Constitutional Legislation Committee recognised the establishment of ACLEI as a 'significant development in the Commonwealth's overall integrity framework'.

However, the Committee also noted that 'there are significant aspects of the Commission's jurisdiction, powers, proceedings and relationships that need to be resolved over the first couple of years'. For these reasons, the Committee recommended that the LEIC Bill should provide for a review of the Act after three years of its operation. The Committee's recommendation was adopted by the Parliament, and is reflected in s 223(a) of the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act).

It is now three years since the LEIC Bill was debated in the Parliament, and over two and half years since the LEIC Act commenced. The most significant development in law enforcement in that time relates to the Prime Minister's announcement in the *First National Security Statement to the Parliament*,² in December 2008, that measures to combat serious and organised crime will be one of the priority areas of the Australian Government's national security framework. Presently, the Australian Government is developing a strategic framework to guide the national approach to combating serious and organised crime.

The Australian Government's resolve to combat organised crime has implications for how law enforcement corruption risk should be addressed in the future. This development adds impetus to the Committee's examination of the operation of the LEIC Act.

Structure of this submission

Using the Inquiry Terms of Reference as a guide, this submission is designed to assist the Committee by providing:

- Section 2: Information about the developing role of the Integrity Commissioner;
- Section 3: A framework for considering jurisdictional issues;
- Section 4: Commentary on developments affecting ACLEI's practices;
- Section 5: Discussion about reporting requirements;
- Section 6: Observations about ACLEI's legislative environment; and
- Section 7: Observations about resources for the law enforcement integrity framework.

ACLEI would be pleased to provide further submissions, should the Committee require further information.

¹ *Inquiry into the provisions of the Law Enforcement Integrity Commissioner Bill 2006, the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 and the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006*. Paragraphs 3.143 - 3.145.

² *The First National Security Statement to the Parliament*, Address by the Prime Minister of Australia, The Hon. Kevin Rudd MP, 4 December 2008, http://www.pm.gov.au/media/speech/2008/speech_0659.cfm (Accessed 27 June 2009).

2. The developing role of the Integrity Commissioner

The general role of anti-corruption commissions

Maintaining and improving public sector integrity are the core concerns of anti-corruption agencies.

Establishing the culpability of an individual and gathering evidence for prosecution or repatriation of the proceeds of crime are ways of achieving these objectives. However, independent investigations may satisfy these public policy endeavours in other ways, including:

- finding the truth of a matter;
- establishing accountability and responsibility;
- allowing stakeholders to learn from what happened;
- providing catharsis or reconciliation;
- providing reassurance; and
- rebuilding public confidence.³

In addition, anti-corruption agencies may apply their experience and observations, gained through investigations and research, to strengthen systems against corruption.

The role of the Integrity Commissioner and ACLEI

The LEIC Act establishes the statutory office of Integrity Commissioner, who is assisted by ACLEI. The LEIC Act commenced on 30 December 2006.

The objects of the LEIC Act, set out 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.

The Integrity Commissioner's functions are set out at section 15 of the LEIC Act.

The law enforcement agencies, whose members are subject to the scrutiny of the Integrity Commissioner under the LEIC Act, are the Australian Crime Commission (ACC), the Australian Federal Police (AFP) and the former National Crime Authority (NCA).

In 2009-10, ACLEI's program objective is:

"to ensure that instances of corruption are identified and addressed, and that law enforcement agencies have appropriate measures in place to control internal corruption risks. In this way, ACLEI can provide independent assurance to the Australian Government about the integrity of prescribed law enforcement agencies."⁴

³ See, Australian Law Reform Commission (2009) *Review of the Royal Commissions Act, Issues Paper 35*, paragraph 2.24. See also section 3 of the LEIC Act, relating to the objects of the Act.

⁴ *Portfolio Budget Statements 2009-10, Attorney-General's Portfolio, Budget Related paper no. 1.2*, Australian Commission for Law Enforcement Integrity, Program objective, page 86.

ACLEI's present policy context

Government policy evolves over time to adjust to, or to create, changed circumstances. The policy context of a government agency, together with any enabling legislation and the resources provided to it, will shape its strategic direction and objectives. ACLEI responds in varying degrees to three government policy objectives, which are discussed below.

- ***Accountability in government***

The Australian Government intends to promote integrity and accountability in Commonwealth agencies through strengthening transparency and accountability measures.⁵

ACLEI is part of a framework of accountability agencies that includes the Commonwealth and Law Enforcement Ombudsman, the Australian Public Service Commission, the Office of the Inspector-General of Intelligence and Security, the Australian National Audit Office, and the proposed⁶ Office of the Information Commissioner. It is expected that enhanced public sector 'whistleblower' arrangements will be added to this framework in the near future.⁷

ACLEI contributes to this framework by:

- guarding against corruption in prescribed law enforcement functions of the Australian Government, including through the use of coercive and/or intrusive investigation methods;
- countering any concerns about the possible limits of internal integrity investigations; and
- receiving independently whistleblower reports relating to law enforcement agencies.

- ***Australia's international anti-corruption obligations***

Australia is a party to the *United Nations Convention against Corruption*⁸ (UNCAC), which provides that:

"Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks."⁹

The ACC and the AFP both have key roles to play in detecting and investigating criminal corruption in Australia and transnationally. The establishment of ACLEI is another means by which the Australian Government meets its UNCAC obligations.

ACLEI contributes in other ways as well, for example the Integrity Commissioner, together with the Secretary of the Attorney-General's Department and the Public Service Commissioner, expects to enter into a memorandum of understanding with the Chairman of the Indonesian Corruption Eradication Commission to facilitate international cooperation on combating corruption.

⁵ Special Minister of State, Media Release, 12 May 2009. *Budget Measures: Promoting Integrity and Accountability*. http://www.smos.gov.au/media/2009/mr_162009.html (accessed 21 June 2009).

⁶ Ibid.

⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, tabled 25 February 2009; and

Special Minister of State, Media Release, 25 February 2009. *Tabling of Whistleblower Report* http://www.smos.gov.au/media/2009/mr_072009.html (accessed 14 July 2009).

⁸ UNCAC is the first binding global instrument on corruption. The United Nations General Assembly adopted the UNCAC by resolution 58/4 in October 2003, and it entered into force on 14 December 2005. Australia signed UNCAC on 9 December 2003 and ratified it on 7 December 2005.

⁹ *United Nations Convention against Corruption* - Article 36, Specialised authorities.

- *The national response to serious and organised crime*
The preamble to the *United Nations Convention against Corruption* states that the Parties to the Convention are concerned “about the links between corruption and other forms of crime, in particular organized crime and economic crime...”¹⁰

In its most recent assessment of the organised crime threat in Australia, the ACC noted the threat posed by corruption as a facilitator to serious and organised crime groups:

“Most [organised crime] groups show few inhibitions in acquiring expertise from wherever it is available.... The willingness and ability to engage in corrupt activities is a strong characteristic of many organised crime groups ...”¹¹

On 4 December 2008, in *The First National Security Statement to the Parliament*, the Prime Minister stated:

“Serious and organised crime, as an ever present threat to the safety and prosperity of Australians and a challenge to the integrity of our institutions, is as important as any other security threat, with an estimated cost in excess of \$10 billion per year. Crime is increasingly sophisticated and transnational. The states and territories have major roles and the Commonwealth needs to engage effectively with them in this area. The current arrangements for coordinating Commonwealth efforts and priorities are limited. There are some gaps in national efforts, such as limited sharing of police capabilities and case management databases, and more attention could be given to criminal intelligence collection and analysis. A strategic framework for Commonwealth efforts in relation to serious and organised crime should be developed for consideration by government.”¹²

On 16 April 2009, the Attorney-General and the Minister for Home Affairs announced that the Standing Committee of Attorneys-General had agreed on a national response to serious and organised crime, including the development by the Commonwealth of an Organised Crime Strategic Framework by mid-2009.¹³

The staffs of agencies with law enforcement functions are particularly attractive targets for recruitment as facilitators and advisers to criminal groups as a consequence of their agencies’ roles in fighting organised crime. Any such compromise of agencies with law enforcement functions puts into jeopardy other legitimate measures designed to address the threat of serious and organised crime to the Australian economy, businesses and individuals.

By detecting, investigating and preventing corruption in the ACC and the AFP, and by building strategic intelligence about corruption in law enforcement, ACLEI assists the Government to meet the contemporary and evolving threat to law enforcement integrity that serious and organised crime presents.

The State anti-corruption agencies also have a role to play in identifying and addressing corruption threats that come to their attention, and to contributing to a national intelligence picture relating to corruption, infiltration and compromise of legitimate law enforcement efforts.

¹⁰ *United Nations Convention against Corruption*, Preamble.

¹¹ Australian Crime Commission, *Organised Crime in Australia 2009*, The Impact of Organised Crime, p5.

¹² *The First National Security Statement to the Parliament*, Address by the Prime Minister of Australia, The Hon. Kevin Rudd MP, 4 December 2008, http://www.pm.gov.au/media/speech/2008/speech_0659.cfm (Accessed 27 June 2009).

¹³ Joint media release, 16 April 2009, *National response to combat organised crime* http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_16_April2009-NationalresponsetocombatOrganisedCrime (accessed 27 June 2009).

ACLEI's origins: a 'precautionary approach'

In contrast to the State integrity agencies, ACLEI was not established in response to a crisis in public confidence of the agencies whose integrity it oversees. At the time the LEIC Bill was debated, as now, there was no perception of a significant or systemic problem with corruption in either the ACC or the AFP.¹⁴

Despite this perception, the Australian Government and the Parliament recognised the enduring threat posed by corruption to law enforcement integrity.

ACLEI's creation can be explained as 'precautionary' policy – in recognition of the high corruption-risk activities undertaken by the ACC and the AFP, and of the reliance that Government has placed on those agencies, as demonstrated by their expanding functions and increasing budgets in recent years.

As an initial step, ACLEI's jurisdiction was restricted to the ACC and the AFP, and to the former NCA. The ability for the Government to add other agencies with a law enforcement function to ACLEI's jurisdiction by regulation recognises that other agencies are also involved, to varying degrees, in activities that might 'invite'¹⁵ corruption.

The LEIC Act model

The LEIC Act and related legislation¹⁶ provides the platform that allows ACLEI to respond to its policy context. Ten of the key features of the LEIC Act model are discussed below.

1. Shared responsibility and partnership between agencies

The LEIC Act supports an arrangement whereby the Integrity Commissioner and the law enforcement agency heads deal with corruption jointly and cooperatively (ss 26, 27). This arrangement recognises both the responsibility that agency heads have for the integrity of their staffs - including for the corruption-detection and deterrence arrangements in their agencies - and the assistance that ACLEI can provide as an external agency.

2. Mandatory notification of corruption issues

The LEIC Act provides for the mandatory notification, by the relevant law enforcement agency head to the Integrity Commissioner, of all information and allegations that raise a corruption issue, irrespective of the source of that information (s 19), or how significant the agency head may consider the information to be. In this way, the Integrity Commissioner acquires an overview of corruption issues within an agency, and indeed over both agencies, can identify any trends and decide independently what action is required on any issue (see point 4).

3. An alternative point of contact regarding corruption issues

The Integrity Commissioner may also receive information or allegations about corruption issues from the Minister (s 18) or other people (s 23). ACLEI provides a point of contact for State integrity agencies and others to provide information about corruption in agencies within its jurisdiction. ACLEI is also an independent alternative for whistleblowers in the ACC and the AFP, and may make arrangements for the protection of witnesses (s 104A).

4. The Integrity Commissioner decides how to deal with corruption issues

The Integrity Commissioner determines independently how each matter should be dealt with (s 26 and s 27) and may initiate an investigation on his or her own initiative (s 38).

¹⁴ See Second Reading Speech of the Attorney-General, the Hon. Philip Ruddock MP, *Hansard*, 29 March 2006, at p 9.

¹⁵ Corruption researchers have referred to the 'invitational edge' of corruption, at which temptations to corruption are particularly acute. See, eg, Manning and Redlinger (1979), cited in Newham (2000) 'Towards Understanding and Combating Police Corruption', *Crime and Conflict*, No. 19, pp 21-25.

¹⁶ Refer to *Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006*.

5. Directing resources to serious problems

The Integrity Commissioner must give priority to issues that constitute serious corruption or systemic corruption (s 16). This obligation ensures that the Integrity Commissioner's focus remains directed to the strategic aspects of corruption control and complements the responsibility that law enforcement agency heads have for the integrity of their staff.

6. Options available for investigation

The Integrity Commissioner may decide to investigate a corruption issue independently or to refer issues back to the agency, or to another agency, for investigation (s 26(1)). The Integrity Commissioner may investigate the corruption issue either alone or jointly with another government agency, including with an integrity agency of a State or Territory (s 26(2)). The Integrity Commissioner may also decide that a corruption issue does not warrant investigation (s 31(2)(b)), or that an investigation should be discontinued or dealt with in a different way (s 42).

7. Access to powers for investigations

The Integrity Commissioner has statutory coercive and intrusive information-gathering powers to assist in investigations (Pt 9, and other legislation¹⁷), similar to those potentially available to Royal Commissions. These powers would not otherwise be available to the ACC and the AFP when conducting their own investigations into themselves. Access to these powers helps in overcoming the difficulties of investigating law enforcement officers who are themselves familiar with detection, surveillance and investigatory techniques.

8. Reporting on investigations

The Integrity Commissioner must submit a report of the outcome of each investigation to the Minister and to the relevant agency head (s 55). A summary of each investigation report must be provided in the Integrity Commissioner's annual report (reg 20(e)). If the Integrity Commissioner were satisfied that it is in the public interest to do so, he or she may disclose information to the public (s 209). In addition, if a public hearing were held in the course of an investigation, or if a report relates to a public inquiry, the Minister must lay the Integrity Commissioner's report before Parliament (s 203).

These arrangements recognise that public reporting of corruption investigation outcomes may be a significant form of sanction against individuals and agencies, and represent a balance of the need to protect reputations against unfair damage.

9. Authority to make findings and recommendations

The LEIC Act authorises the Integrity Commissioner, when reporting on investigations, to recommend measures to remedy deficient practices that can give rise to corruption or hamper its early discovery (s 54(3)(d)). The Integrity Commissioner may also make recommendations and comments on the final report of investigations that have been referred to other Commonwealth agencies (s 67). In these ways, ACLEI adds value to agencies' own efforts to manage corruption risks and addresses systemic weaknesses in the integrity framework.

10. Strengthening the integrity system

An important function of the Integrity Commissioner, and of the Committee, is to advise Government and the Parliament on trends and changes in corruption risks in law enforcement, and to report on changes that might be desirable (ss 15(f), 201(2)(d) and 215(d)).

¹⁷ Refer to *Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006*.

A 'corruption-risk approach'

Since ACLEI's establishment, 114 notifications and referrals of corruption issues have been received,¹⁸ with most contributing in some way to building a contemporary picture of corruption in law enforcement. Further intelligence about corruption has been collected through ACLEI's assessments and investigations, as well as information-sharing with other agencies.

ACLEI's investigations not only examine individual corruption issues in the ACC and the AFP, but also go further, in order to understand motive, circumstance, method and environment. In this way, useful information is gathered about how corruption may arise and exist, building a picture of how to counter corruption. In addition to evidence about the conduct of individuals, investigations generate contextual intelligence about trends, possible links to organised crime, potentially deficient practices, workplace cultures and other types of corruption risk that provide the basis for the Integrity Commissioner's recommendations for systemic change.

What has emerged is the importance of identifying the systemic vulnerabilities to corruption that each issue may illustrate, whether or not corrupt conduct is subsequently found to have occurred. This information is provided to the agencies, to inform them as to ways in which practices and procedures may be strengthened. In short, investigation is the beginning, not the end, of addressing a corruption issue. ACLEI refers to this development as the 'corruption-risk approach'.

Under the 'corruption-risk approach', ACLEI uses the information it receives from investigations to inform its strategic intelligence, research and policy activities and capabilities. Likewise, strategic intelligence, research and policy inform ACLEI's approach to investigations and the prevention of corruption in law enforcement agencies. Intelligence-sharing with other integrity agencies also contributes to building the picture of the nature of corruption risks and how they may be addressed.

For instance, several ACLEI investigations about unauthorised releases of information, together with investigation outcomes from other jurisdictions, informed the Integrity Commissioner's submission¹⁹ to the Australian Law Reform Commission's (ALRC) current *Inquiry into Secrecy Law*, thereby contributing to corruption deterrence policy development in all areas of government administration.

ACLEI's 2009 report, *Resistance to Corruption* – a cooperative joint pilot project that examined the high-level anti-corruption arrangements of the ACC and the AFP – is also an example of this application. By undertaking such programs, ACLEI intends to provide further assurance to the Minister about the adequacy of the Commonwealth law enforcement integrity system.

The adoption of the 'corruption-risk approach' is an important advance on the 'precautionary' approach upon which ACLEI was established.

¹⁸ Figure provided is to 30 June 2009.

¹⁹ [http://www.aclei.gov.au/www/aclei/rwpattach.nsf/PublicbySrc/review+of+secrecy.pdf/\\$file/review+of+secrecy.pdf](http://www.aclei.gov.au/www/aclei/rwpattach.nsf/PublicbySrc/review+of+secrecy.pdf/$file/review+of+secrecy.pdf) (accessed 21 June 2009).

Horizons

The LEIC Act and related legislation has provided a solid foundation of powers, obligations and direction. Nevertheless, at this stage of ACLEI's development and experience, ACLEI's legislative footing would benefit from some changes. A number of suggestions are discussed in section 6 of this submission. The separate issue of jurisdiction is discussed in section 3.

It was always expected that ACLEI would develop according to its operational experience. It is worth noting that ACLEI should also develop according to the changing policy context relating to law enforcement and accountability.

Accordingly, some 'horizon' prospects for improving the effectiveness and efficiency of the law enforcement integrity framework are noted below. A few of these proposals may require legislative reform, but most could be achieved by advances in agreed policy direction and the resources that would ordinarily accompany new policy proposals in government.

- *Responding to contemporary challenges*

Measures to address Australia's integrity needs must remain relevant and responsive to contemporary issues in law enforcement and government policy. As noted, the chief development in law enforcement since ACLEI's commencement is the Prime Minister's announcement of an intention to enhance and coordinate national policy to combat serious and organised crime threats.

The Integrity Commissioner intends to contribute to this national effort by further developing ACLEI's capacity to be a source and conduit of strategic intelligence about corruption in law enforcement.

- *Building a national perspective on integrity in law enforcement*

Corrupt activity does not respect jurisdictional or organisational boundaries. In its report on the *Inquiry into Law Enforcement Integrity Models*, the Committee noted²⁰ the operational benefits of continued cooperation between integrity agencies and recommended:

“...that the Australian Government initiates the establishment of a national forum through which matters of mutual interest to state and federal law enforcement integrity agencies can be addressed.”²¹

A forum of anti-corruption agencies could monitor and report on the threat of corruption in law enforcement nationally. The Integrity Commissioner is consulting with his State and Territory counterparts about potential national approaches to combating corruption.

As an example of cooperative programs that could be useful, the acting Director of the Office of Police Integrity of Victoria, Mr Graham Ashton, has suggested the collaborative development of a set of national indices to assess the integrity of law enforcement agencies.

- *'National approach' efficiencies*

ACLEI and the State anti-corruption agencies, jointly with the Attorney-General's Department, are exploring options to bring efficiencies into the delivery and enhancement of telecommunications and data interception technology.

- *Maturing the 'integrity partnerships' with the ACC and the AFP*

The Integrity Commissioner is committed to building on the opportunities presented by the cooperative integrity partnerships that have emerged with the ACC and the AFP. ACLEI is in ongoing discussion with the ACC and the AFP about how the integrity framework for law enforcement is working and how it may be strengthened, for example by better resource sharing, exchange of intelligence, and cooperative risk identification and assessment.

²⁰ PJC on ACLEI *Inquiry into Law Enforcement Integrity Models*, paragraph 5.31.

²¹ PJC on ACLEI *Inquiry into Law Enforcement Integrity Models*, recommendation 4, paragraph 5.38.

- *Integrity testing*
Covert integrity tests simulate corruption opportunities, thereby examining the honesty of individuals in a controlled (and observed) situation. The AFP is presently designing an integrity testing regime to meet its own integrity needs. This development raises questions about whether an integrity testing regime should apply across a broader range of agencies with law enforcement functions, and what should be the Integrity Commissioner's role in integrity testing.
- *Further strengthening ACLEI's investigative capacity*
Presently, ACLEI's investigations are mainly reactive and restricted in their form by available resources and infrastructure. It is clear that a strengthened investigation and strategic intelligence capacity is now required, above the level needed to deal with current workload demands, if the Integrity Commissioner is to make use of the 'own initiative' power (s 38).
- *Adding value to agency investigations*
Final reports on corruption issues referred to the ACC and the AFP for investigation must be submitted to the Integrity Commissioner after each investigation is completed under section 66(3) of the LEIC Act. ACLEI is now entering a new phase in which these reports are reaching completion and being provided to the Integrity Commissioner for assessment.

The Integrity Commissioner will assess each investigation report to meet his responsibility to provide independent assurance of the integrity of staff members of the agency concerned. Section 67 of the LEIC Act provides the Integrity Commissioner with the ability to make recommendations for further systemic changes to improve corruption resistance within an agency. Accordingly, 'section 66 reports' are an ideal vehicle by which ACLEI may monitor the quality of agency internal integrity investigations.

- *'Patterns and Trends' capacity*
Subject to workload, the Integrity Commissioner intends to consolidate observations about corruption risk gathered from assessments and investigations and other sources into a regular report to the Committee. Subject to the Committee's view, it is envisaged that the report could be the subject of an annual private meeting between the Committee and the Integrity Commissioner, in support of the Committee's statutory function relating to monitoring patterns and trends (s 215(1)(d)).
- *Corruption research management capacity*
The Integrity Commissioner is exploring options to undertake or manage targeted research projects that would advance an understanding of corruption and its control, such as generating best practice advice relating to the internal investigation of corruption.
- *ACLEI's corruption risk review capacity*
The *Resistance to Corruption* joint pilot project examined the high-level anti-corruption arrangements of the ACC and the AFP. The project identified opportunities for further collaborative work in targeting individual areas of risk in these two agencies and to build ACLEI's capacity to assist agencies to assess their corruption risk and treatments overall. Allied to this program is the need to ensure that ACLEI is able to deliver contemporary best-practice advice about corruption control design.
- *Commissions of Inquiry standing secretariat*
The ALRC is inquiring presently into the *Royal Commissions Act 1902*. One proposal being considered by the ALRC is that there should be a standing Secretariat,²² in part to ensure that there is an on-going expertise available relating to the use of coercive powers in an investigatory context. By necessity, ACLEI is developing its own expertise in this area, and would be pleased to contribute to this new development.

²² ALRC, *Issues Paper 35*. Paragraphs 6.38-6.42: Questions 6-5 and 6-6.

3. ACLEI's jurisdiction

In this section, the Inquiry's terms of reference (a)(i)-(v), which relate to jurisdiction, are addressed individually, followed by a description of a possible alternative approach to jurisdiction.

In summary, ACLEI's view is that:

- ACLEI's investigative jurisdiction should remain focussed on countering law enforcement corruption;
- the LEIC Act should apply to named law enforcement agencies that have a high inherent risk of corruption due to:
 - information held, or operational activities undertaken, that have a strong nexus with combating serious and organised crime;
 - close interaction with other law enforcement agencies that have high inherent corruption risks; and
 - whose operational staff may operate with a high degree of autonomy or discretion, away from central control.
- the present arrangement, whereby other agencies with law enforcement functions may be added to jurisdiction by regulation, should continue as a safeguard;
- all staff members of an agency in jurisdiction should be included, irrespective of their role; and
- ACLEI would be prepared to extend corruption prevention assistance to other agencies under special arrangements.

(a)(i) - *The merits or limits of extending ACLEI's jurisdiction to other Commonwealth departments and agencies with a law enforcement function and/or coercive powers*

What is law enforcement corruption?

As previously noted, in public sector agencies with law enforcement functions, corrupt conduct, intentionally or not, undermines legitimate measures to combat serious and organised crime and erodes public confidence in the impartial administration of justice.

Because of the functions and powers of law enforcement agencies, corruption is more likely to manifest in particular ways within those agencies. Annexure One contains a contextual description of corruption and provides some examples of law enforcement-specific behaviour that may indicate a corruption problem.

What makes law enforcement especially attractive to corruption?

Access to information about detection and investigative methods, witnesses and evidence is one set of reasons that makes agencies with law enforcement functions attractive targets for infiltration or subversion by organised crime. Another compelling reason is the prospect of making use of a corrupt official's law enforcement powers or functions to support or protect criminal activity. If law enforcement were compromised by corruption, so would Australia's ability to detect, investigate and prosecute criminal threats to the Australian economy, businesses and individuals.

An expanded jurisdiction?

A feature of corruption is its adaptability to circumvent regulatory efforts and its responsiveness to exploit new opportunities. Australia's integrity framework must remain alert to and relevant to contemporary issues in law enforcement and in government policy. The most prominent of these issues at this time are the increasing emphasis on public accountability and the national response to serious and organised crime.

There is value in maintaining the original 'precautionary' approach, combining it with the key elements of the ACLEI model: cooperative integrity partnerships, a systemic approach to investigations, strategic intelligence and a focus on managing corruption risk.

Within this policy and operational context, ACLEI supports the extension of jurisdiction to a limited number of additional agencies, based on inherent corruption risk and the potential for corruption to be 'displaced' between agencies: from an agency with a strong integrity regime to an agency whose anti-corruption measures are perceived as being less developed.

ACLEI has developed a list of possible criteria for assessing inherent corruption risk. This list is appended at Annexure Two.

The assessment criteria address the five broad risk areas of:

- influence and authority (*including powers*);
- type of work;
- working environment;
- operational risks; and
- organisational environment.

The Committee may note that funding and resourcing constraints, discussed further in section 7 of this submission, would affect the viability of any change in ACLEI's jurisdiction.

(a)(ii) - an examination of the definition of 'law enforcement function' within the Act (section 5), including identification of the agencies to whom this definition applies

The present LEIC Act definition of 'law enforcement function' is broad and provides the Australian Government with the flexibility to ensure that law enforcement functions in emerging or priority areas of policy, or areas attracting public concern, can be subject to scrutiny by the Integrity Commissioner.

Generally, Commonwealth agencies work within legislative environments and a significant proportion of agencies have regulatory functions intended to enforce the laws they administer. It is debatable how many of these functions should fall within the broad definition of 'law enforcement function' in section 5 of the LEIC Act.

In ACLEI's view, it is problematic and unnecessary to reach a definitive list of agencies on this question. As can be seen from Annexure Two, ACLEI's strategic concern is with agencies that have a high inherent corruption risk that is due to a nexus with combating serious and organised crime. ACLEI wishes to ensure that its attention and resources are not diluted by the requirements of servicing too broad a jurisdiction.

Accordingly, ACLEI suggests that the Committee should note the strategic link between law enforcement corruption and serious and organised crime.

(a)(iii) - the administrative and operational practicalities of restricting the Integrity Commissioner's jurisdiction to matters pertaining to an agency's law enforcement function

Law enforcement may be only one of a number of functions and services delivered by an agency. However, administrative staff and other employees or contractors support, or have access to, the agency's law enforcement functions, information, decision-making powers, staff and systems. These staff may be soft targets and are as attractive and vulnerable to subversion or coercion by criminal groups as law enforcement personnel.

Accordingly, any additions to Integrity Commissioner's responsibilities should include the authority to investigate and analyse corruption in all activities of any agency added to the LEIC Act jurisdiction.

However, for any addition to ACLEI's jurisdiction, the Integrity Commissioner should give priority to those corruption issues that arise because of the agency's role in law enforcement. This objective may be achieved by an amendment to the LEIC Act, possibly in section 16.

(a)(iv) - the merits or limits of extending jurisdiction to other agencies by means of regulation or legislation

ACLEI supports the present arrangement, whereby a number of 'core' agencies are prescribed by the LEIC Act, with the provision for other agencies with law enforcement functions to be added by regulation, were the need to arise.

This arrangement offers flexibility for Government and for ACLEI, and ACLEI is confident that the public reporting mechanisms available to the Committee and to the Integrity Commissioner are an adequate safeguard to protect the integrity of these arrangements.

(a)(v) - the expansion of the Integrity Commissioner's anti-corruption education and prevention role to all Commonwealth departments and agencies

The Australian Public Service (APS) has high standards of ethics and conduct, and there are other agencies whose function it is to help the APS maintain and support these standards. These agencies include the Australian Public Service Commission, now incorporating the Ethics Advisory Service, the Commonwealth and Law Enforcement Ombudsman and the Australian National Audit Office. In addition, the Australian Federal Police may investigate criminal corruption and fraud offences in public sector agencies.

However, none of these agencies has the investigation and systemic treatment of *corruption* or *corruption risk* as their central focus. Treatment of corruption requires more than 'criminalisation', 'fraud control' or 'values-based controls', although all of these approaches are measures that may also counter corruption.²³

ACLEI's growing body of knowledge about the management and treatment of corruption risk, gained in the law enforcement environment, is transferable and can make a valuable contribution to education and prevention programs in other government agencies.

If funded, a broader anti-corruption education and prevention program could be achieved without diluting ACLEI's primary focus on assuring law enforcement integrity, for example using bilateral agreements with specific agencies.

²³ Philip Moss, Integrity Commissioner, *Corruption: Matching Measures to Risks*, Address to the Corruption Prevention Network, Canberra, 12 June 2009.

An alternative approach to ACLEI's jurisdiction?

The LEIC Act law enforcement integrity model is one that seeks to match measures to risks, with an emphasis on cooperative partnership. As noted above, ACLEI supports an expansion of 'core' investigative jurisdiction to agencies with a law enforcement function that have a high inherent corruption risk due to their role in law enforcement. ACLEI is also prepared to assist other agencies with corruption prevention activities.

Application of the assessment criteria, proposed by ACLEI in Annexure Two, is likely to result in a spread of outcomes – from high inherent risk to lower risk. Agencies may be considered 'at risk' for different reasons and may require different anti-corruption treatments. Other agencies may be placed 'at risk' due to 'displacement' factors, because of a strengthened integrity regime in an agency with which they have close operational relationships.

Within the ACLEI model, there are existing 'variables', or areas where the LEIC Act or ACLEI's practices could be varied to accommodate different levels of risk.

These variables include:

- Options for notification of corruption issues
 - mandatory notification to the Integrity Commissioner (s 19); or
 - voluntary notification.
- Options for investigation (s 26), decided by the Integrity Commissioner (s 27)
 - public or private inquiries;
 - investigation by the Integrity Commissioner;
 - joint investigation by both the agency and the Integrity Commissioner;
 - investigation by the agency, managed or overseen by the Integrity Commissioner;
 - or
 - investigation by the agency alone, reporting to the Integrity Commissioner.
- Options for jurisdiction relating to 'own initiative' investigation (s 38)
- Options for corruption risk assessment of an agency or function within an agency
 - as recommended by the Integrity Commissioner; or
 - on request.
- Options for corruption prevention advice / recommendations for systemic change
 - by the authority of the Integrity Commissioner (s 54, s 67); or
 - on request.
- Options for corruption education and awareness-raising
 - by the authority of the Integrity Commissioner; or
 - on request.

Annexure Three sets out an example tiered 'functional model' for jurisdiction that may assist the Committee in its deliberations on questions of jurisdiction. ACLEI raises this option only to demonstrate the flexibilities that could be added to the LEIC Act model.

How could a functional approach apply?

A functional approach would allow for the tiered or stepped treatment of jurisdiction and different measures for different agencies. The example three-tiered model is described briefly below.

Tier One – ‘Core’ agencies with significant law enforcement functions, close operational ties and high inherent corruption risk*

The Integrity Commissioner has full jurisdiction. The notification of corruption issues to ACLEI is mandatory. The Integrity Commissioner provides assurance to the Government about the integrity of staff members of the agency. ‘Core’ agencies would be nominated in the LEIC Act, as is the present arrangement.

Tier Two - Other prescribed agencies with important law enforcement functions and lower corruption vulnerability*

The Integrity Commissioner supports the agency in meeting its anti-corruption obligations. The referral of corruption issues to ACLEI is voluntary. The Integrity Commissioner may agree to investigate corruption issues on request or provide corruption prevention advice and education. The Integrity Commissioner does not provide general assurance to the Government about the integrity of staff members of the agency, but may report on a specific corruption issue or topic.

Tier Three - Other Commonwealth agencies

ACLEI is an anti-corruption awareness-raising resource, complementing and working collaboratively with, other APS integrity, whistleblower and ethics awareness initiatives. The Integrity Commissioner may, on request, provide specific corruption prevention advice or education on a cost recovery basis.

** The LEIC regulations could provide for agencies with law enforcement functions to be added to Tiers One and Two, as needed.*

The three tiers of this model allow for graded treatment of agencies based on assessed corruption risk. The model builds on the ‘precautionary approach’ by not assuming the presence of corruption in any one agency, but by containing the flexibility to investigate corruption in a wider range of agencies should it become necessary. Under the model, the Minister may request the Integrity Commissioner to investigate a corruption issue relating to agencies in Tiers One and Two. The model should also integrate with any new whistleblower arrangements, discussed in section 4 of this submission.

In addition, Tier Three of the model provides an avenue for other Commonwealth agencies to seek ACLEI’s support in corruption prevention and education. This arrangement invites new agencies to join the existing integrity partnership between ACLEI, the ACC and the AFP, and to contribute to building the anti-corruption framework of the Commonwealth.

The success of such a model would be dependent on appropriate funding of ACLEI’s functions in relation to each tier, and on clear legislative authority in relation to the functions of the Integrity Commissioner (s 15).

4. Developments affecting ACLEI's practices and/or legislation

The Inquiry's term of reference (b) relates to administrative, policy, legislative and case law developments that may affect ACLEI's practices and/or legislation.

The Integrity Commissioner has a watching brief on a number of developments and emerging issues that may affect ACLEI. To date, none has posed a major concern for ACLEI. An outline of these developments is presented below.

Reforms to Freedom of Information arrangements

The Government has proposed reforms to the present Freedom of Information arrangements to strengthen transparency and accountability arrangements in public sector agencies. While supporting these reforms, ACLEI will be mindful to ensure that the confidentiality of investigations and operational methods is not compromised.

Reforms to Privacy Act arrangements

In its 2008 report, *For your information: Australian privacy law and practice*, the ALRC recommended significant reform of the *Privacy Act 1988*. To date, the Government has not responded formally to the ALRC's recommendations.

In relation to ACLEI, the ALRC recommended²⁴ that the Integrity Commissioner and ACLEI should remain outside of the Privacy Act arrangements, but that personal information-handling guidelines should be developed in consultation with the Privacy Commissioner, and their implementation should be overseen by ACLEI's internal audit committee and the Committee.

ACLEI has since drafted guidelines and will shortly commence consultations with the Privacy Commissioner as to their suitability. ACLEI's internal audit committee recently amended its charter to accept responsibility for overseeing ACLEI's handling of personal information. ACLEI proposes to brief the Committee annually on compliance with the policy.

Public sector 'whistleblower' arrangements

In its February 2009 report, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended the introduction of new public interest disclosure legislation to apply to Australian Government agencies. To date, the Government has not responded formally to the recommendations.

The recommendations recognise and preserve the present 'whistleblower' arrangements relating to the ACC and the AFP, by which staff members may report to ACLEI concerns about corruption in their respective agency.

Contempt and related matters

As part of its review of the Royal Commissions Act, the ALRC is examining penalties for non-compliance with coercive powers. To date, ACLEI has not experienced any problem with compliance. However, ACLEI will monitor the ALRC's inquiry, to ensure that the LEIC Act penalty arrangements remain current.

²⁴ Recommendation 37-2.

In relation to contempt, the Parliamentary Joint Committee on the ACC has recommended:

“that the Australian Government amend the *Australian Crime Commission Act 2002* to include a statutory definition of contempt, the statutory power of referral, plus ancillary provisions and/or expedite the judicial process for Australian Crime Commission contempt matters.”²⁵

In ACLEI’s view, consideration should be given to mirroring these provisions in the LEIC Act, as noted in section 6 of this submission – *Legal-policy issues* (p19).

Serious and organised crime policy

As noted at page 4 of this submission, the Australian Government is developing a new framework to combat serious and organised crime as one of the national security priorities. The framework is being developed by the Attorney-General’s Department, in consultation with the Standing Committee of Attorneys-General.

ACLEI has contributed to the development of the framework, in so far as it relates to the threat that corruption in law enforcement poses to legitimate law enforcement objectives.

Judging by the Prime Minister’s *National Security Statement* alone, the new policy direction may affect ACLEI in three ways:

- implications for ACLEI’s jurisdiction (as noted previously);
- the growing importance of ACLEI’s corruption-detection and strategic intelligence roles; and
- the need to establish coordination arrangements for national intelligence relating to law enforcement corruption to emerge.

ACLEI will continue to engage with the Attorney-General’s Department about these developments.

Integrity Testing

As noted in section 2 – *Horizons* (p9), the AFP is considering establishing an integrity testing regime.

However, it is not yet clear what ACLEI’s role may be, or how such a regime would inter-relate with the LEIC Act. Given the developmental stage of the proposal, it may not be possible to consider these matters as part of the Committee’s present Inquiry.

Case law

In the two and a half years since the LEIC Act was enacted, there have been a number of developments in case law that could have an impact on ACLEI’s operations, for example:

- legal professional privilege affecting the rights of third parties who are not recipients of notice or summons;
- spousal privilege in relation to incriminating evidence concerning the other spouse;
- refusal to answer questions when directed; and
- nature and structure of the examination of a witness when he or she is currently subject to other criminal proceedings, including proceeds of crime.

As these matters have an impact that is broader than ACLEI, the Attorney-General’s Department coordinates the policy response for Government. ACLEI would expect to contribute to the Attorney-General’s Department’s consideration of these matters, as is normally the case.

²⁵ Parliamentary Joint Committee on the Australian Crime Commission (June 2009), *Examination of the Australian Crime Commission Annual Report 2007-08*, Recommendation 1, paragraph 2.56.

5. ACLEI's reporting requirements

The Inquiry's term of reference (c) relates to the adequacy of ACLEI's reporting requirements with respect to performance and to investigation outcomes as set out in the Act and associated regulations.

Private versus public reporting

Occasionally, in relation to the accountability and transparency of integrity agencies, there is debate about presumptions for or against public reporting of investigation outcomes.

In the Integrity Commissioner's view, the current provisions of the LEIC Act relating to the presentation of investigation reports achieve an appropriate balance between the public interest, the privacy and protection of witnesses, and operational practicalities:

- when the LEIC Act does not require a report to be made public, the Integrity Commissioner may decide to release information in the public interest (s 209); and
- the Integrity Commissioner is required by the LEIC Regulations to provide a summary of investigation reports in each year's annual report.

Together, these provisions recognise the need to withhold information from public exposure in certain circumstances, at least temporarily, in order to:

- protect against unfair harm to the reputations of individuals whose conduct has been under investigation;
- protect other witnesses, including their identities;
- prevent a contempt of court from arising, or the prejudicing of court proceedings;
- protect ACLEI's investigatory methods; and
- prevent compromise to related, ongoing investigations.

'Prescribed particulars'

The LEIC Act provides for the inclusion of prescribed particulars about corruption issues and investigations in the annual report (s 201(2)). In the *Examination of the Annual Report of the Integrity Commissioner 2007–08*, the Committee stated its view that the LEIC Regulations should be revised within the context of this Inquiry.²⁶

Further, the Australian Government's *Operation Sunlight* has introduced a requirement for greater detail in relation to public reporting of government agencies' impact and activities.²⁷ ACLEI has revised its Key Performance Indicators for 2009-10 in accordance with the new requirements.²⁸

The LEIC Regulations ensure a minimum level of reporting of caseload and throughput (clearance rates). These measures are process-based, and do not comprehensively reflect the impact of ACLEI's work. Nor do these measures take into account the complexity and sensitivity involved in many of ACLEI's investigations.

In his annual reports, the Integrity Commissioner seeks to demonstrate both how ACLEI adds value to the integrity of law enforcement agencies, in response to the objects of the LEIC Act, and how ACLEI contributes to meeting the Government's aims in relation to integrity in law enforcement and accountability. In so doing, the Integrity Commissioner regularly reviews the information that the annual reports include.

²⁶ PJC on ACLEI *Examination of the Annual Report of the Integrity Commissioner 2007-08*, paragraph 2:30, reinforcing an observation made by the Committee in the previous year's report.

²⁷ <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/operation-sunlight/index.html>, (accessed 20 July 2009).

²⁸ See, *Portfolio Budget Statements 2009-10, Attorney-General's Portfolio, Budget Related Paper No. 1.2*, page 88.

As ACLEI's role develops, it is expected that workload information, case movement statistics and summary information about investigations will be further supplemented by information reflecting the complexity of cases, growing body of strategic intelligence and deeper understanding of corruption, its causes and treatments. In this way, the annual report may inform government about the treatment and management of corruption and corruption risk in law enforcement agencies and more generally.

Patterns and trends

As noted in section 2 – *Horizons* (p9), subject to workload, the Integrity Commissioner intends to consolidate observations about corruption risk gathered from assessments and investigations and other sources into a regular report to the Committee. This arrangement, if adopted, would supplement the obligations of s 201(2)(b), relating to annual reports.

Proposal

Given ACLEI's commitment to reporting across the breadth of its activities, and subject to the view of the Committee, the Integrity Commissioner considers that a revision of the LEIC Regulations in relation to reporting is not urgent and may be most productive after the other matters examined in this Inquiry are settled.

ACLEI would be pleased to consult with the Committee to review the government's reporting needs and work with the Attorney-General's Department to ensure they are reflected in the LEIC Regulations.

6. Strengths and limits of ACLEI's legislative environment

The Inquiry's term of reference (d) relates to the strengths and the limits of the LEIC Act and regulations, and of other arrangements arising from the *Law Enforcement Commissioner (Consequential Amendments) Act 2006*.

The LEIC Act and related legislation have enabled ACLEI to develop a strong and unique anti-corruption and integrity assurance model, as described in section 2 of this submission.

General legislative matters

As legislative limits have become apparent over the two years of operation, ACLEI has brought these matters to the attention of the Attorney-General's Department. The Department is assessing and progressing each matter according to the Government's legislative priorities.

These matters, while important, do not represent significant changes to ACLEI's operating framework. The amendments aim to ensure that ACLEI can continue to carry out its functions in an effective and efficient manner. Broadly speaking, the amendments seek to:

- improve the arrangements for the execution of search and arrest warrants;
- improve the operation of summons and requests to produce; and
- remedy technical and drafting problems.

ACLEI and the Attorney-General's Department have been working together to refine the amendments. ACLEI hopes that they can be introduced in the Parliament as soon as practicable.

Legal-policy issues

Thus far, ACLEI has not used all of the legislative provisions of the LEIC Act, and so practical experience with these provisions is not available. Even so, ACLEI is considering the implications of a number of further legislative issues, which are set out below for the information of the Committee.

While ACLEI has a provisional position on some of these issues, there is no expectation that any of them will be resolved during the present Inquiry. Rather, these issues are raised because ACLEI seeks to engage positively and transparently with the challenges of its operating environment.

- ***Does ACLEI's legislative environment adequately facilitate investigations and inquiries?***

Contempt

Are the processes for managing uncooperative witnesses sufficient? Should the Integrity Commissioner's situation be similar to that recommended for the ACC by the Parliamentary Joint Committee on the ACC?

The ACC has identified an increase in the number of persons summonsed who prefer to be charged with contempt than to cooperate in coercive hearings, regardless of any penalty or use-indemnity.²⁹ Although ACLEI has not yet faced such a situation, consideration should be given to mirroring in the LEIC Act the provisions recommended by the Parliamentary Joint Committee on the ACC, as discussed in section 4 of this submission – *Contempt and related matters* (pp15-16).

²⁹ Parliamentary Joint Committee on the Australian Crime Commission, (June 2009), *Examination of the Australian Crime Commission Annual Report 2007-08*, 2.52-2.54

Use-indemnity

Does the present question-by-question indemnity against self-incrimination (use-indemnity) adequately protect witnesses and support investigations and hearings?

ACLEI is discussing with the Attorney-General's Department whether there should be changes, including the option of blanket use-indemnity or automatic use-indemnity.

Intrusive methods

For investigations conducted under the LEIC Act, do the legislative thresholds for use of intrusive methods (telecommunications interception and access; access to stored communications; and use of surveillance devices) appropriately address the challenges of investigating law enforcement corruption issues?

The legislation that governs these powers affects State and other Commonwealth law enforcement agencies and requires specific consideration. Accordingly, ACLEI intends to raise the issue with the Attorney-General's Department to enable appropriate consultation to occur.

Questions of law

Should there be a mechanism in the LEIC Act to refer to the Federal Court of Australia questions of law that may arise during investigations?

There is currently no mechanism under the LEIC Act to settle questions of law that may arise during an investigation or inquiry. This situation may lead to difficulty in resolving legal challenges about the conduct or findings of an investigation. The *Ombudsman Act 1976* contains provisions under ss 10 and 11 to refer questions to the Administrative Appeals Tribunal and the Federal Court. A similar provision would be useful for ACLEI.

False allegations

Should there be a penalty in the LEIC Act for intentionally providing false information or allegations?

The *Criminal Code Act 1995* (at s 137) already contains provisions against knowingly providing false or misleading information or documents to a Commonwealth entity. Also, ACLEI is mindful that potential whistleblowers should not be discouraged from contacting ACLEI if they were concerned that they may lack firm evidence to support a suspicion.

Delegation of hearing powers (s 219, LEIC Act)

Should the Integrity Commissioner be able to delegate the power to hold public hearings for investigations and for public inquiries?

The power of delegation would provide flexibility if required at a future date.

- ***Does ACLEI's legislative environment adequately support a systemic or risk-based approach?***

Exchange of intelligence

How may the LEIC Act better support the exchange of intelligence about corruption between anti-corruption and law enforcement agencies?

The existing requirement to disclose information or intelligence only to the head of an agency has the potential to create delays for active law enforcement operations. An amendment to s 208 to allow disclosure by an ACLEI staff member under delegation from the Integrity Commissioner to appropriate agency staff as well as, or instead of, the head of an agency would be advantageous.

Ombudsman Act

Should section 6(16) of the Ombudsman Act be amended to remove the discretion not to refer issues to the Integrity Commissioner?

ACLEI has not formed a view on this issue, and will consult with the Ombudsman's office and monitor the effect of this provision.

Determinations of AFP misconduct issues

Should the Integrity Commissioner be consulted prior to determinations being made under s 40RM of the Australian Federal Police Act 1979 (relating to categorisation of conduct of AFP appointees)?

ACLEI considers that such an arrangement may help the Integrity Commissioner to meet the obligation under s 16 of the LEIC Act to give priority to systemic corruption.

Integrity checks

Should the Integrity Commissioner have a formal 'integrity reporting' role relating to senior law enforcement promotions, similar to the role of the Police Integrity Commission under s 71 of the Police Act 1990 (NSW)?

Subject to further consultation, such a role would enhance the integrity partnership between the heads of the ACC, the AFP and the Integrity Commissioner and their ability to maintain and improve the integrity of the agencies in ACLEI's jurisdiction. A legislative basis could be achieved by adding it to the Integrity Commissioner's functions at s 15 of the LEIC Act.

Integrity Testing

Should integrity testing be conducted? Which agencies should be subject to such a regime? Is legislation required? If so, should there be stand-alone legislation, or amendment to the LEIC Act, or some other arrangement? In either case, how should integrity testing relate to the Integrity Commissioner's functions?

The AFP is considering an integrity testing system that would apply to AFP staff and the Integrity Commissioner has had related discussions with the AFP and the Australian Federal Police Association (AFPA). ACLEI expects to have further discussions with the ACC, the AFP and AFPA on this topic.

- **Does ACLEI's legislative environment adequately ensure ACLEI's accountability?**

Hearings: private or public

Should ACLEI's corruption investigation hearings be held in public? What would be the consequence?

When a corruption issue is already in the public domain, a public hearing is an important method for dealing with the issue and rebuilding public confidence. However, the ability to hold hearings in private protects the reputation of witnesses from unfair harm or prejudice. Evidence given in a private hearing can also be used to inform the direction of an ongoing investigation.

ACLEI corruption issues

Should the Minister have the option of allowing the Integrity Commissioner to investigate corruption issues relating to ACLEI staff?

The LEIC Act prevents the Minister from referring an ACLEI corruption issue to the Integrity Commissioner if the issue relates to the conduct of a person appointed or employed under the *Public Service Act 1999* (s156(3)). The Minister should have the opportunity to assess an allegation or information and have a range of options for further action, including referral to the Integrity Commissioner for investigation and reporting.

7. Resources

The Inquiry's term of reference (e) relates to the resources required to perform the functions set out in the LEIC Act and, in particular, the resourcing implications of any extension of ACLEI's jurisdiction.

The terms of reference of the present Inquiry invite both a retrospective assessment of the operations of the LEIC Act, and a prospective assessment of what ACLEI could become. Accordingly, this submission first addresses the review aspect, and secondly discusses ACLEI's strategic development.

Review aspect

The Committee has twice³⁰ recommended that the Australian Government undertake a review of ACLEI's funding levels, as a matter of urgency. Such a review should take account of: unanticipated growth in ACLEI's workload; the unexpected complexity of its investigations; other unbudgeted aspects of ACLEI's work; and consider resources for new functions recommended by the Committee³¹, namely corruption education and prevention activities.

Discussions with the Attorney-General's Department are continuing on these recommendations, and other recommendations made by the Committee in its *Inquiry into Law Enforcement Integrity Models*.

Strategic development

ACLEI's report *Resistance to Corruption* questions whether adequate resources are being applied to the integrity arrangements of the ACC and AFP, not just to ACLEI. The report notes that there is scope for more to be done to ensure that integrity systems are matched to their task, and that resource-sharing arrangements are in place to ensure that anti-corruption resources are applied efficiently.

In its submission to this Inquiry, ACLEI has noted that there is a new impetus for renewed consideration of ACLEI's development and resources at this time, including the need to:

- enhance ACLEI's strategic intelligence, corruption-detection and investigation capabilities to meet the challenges of the nexus between corruption and organised crime by:
 - coordinating a national response relating to law enforcement corruption, for example through a national forum of anti-corruption agencies;
 - undertaking targeted 'own initiative' investigations; and
 - bolstering ACLEI's corruption-research management capacity;
- respond to any broadening of ACLEI's jurisdiction or functions by:
 - strengthening ACLEI's senior management structure;
 - adding multi-disciplinary investigation teams proportionately;
 - strengthening the capability to undertake investigations independently; and
 - undertaking detailed assessments of the anti-corruption arrangements of any new agencies;
- ensure ACLEI can meet its obligations to assess section 66 reports; and
- engage with agencies about the development and further enhancement of anti-corruption arrangements, including integrity testing.

For these reasons, there is a critical timing aspect to consideration of further resources to develop ACLEI in these ways.

There may also be the potential to achieve efficiencies and longer-term savings across the integrity system through resource sharing and coordination, for example through the potential for centralisation of telecommunications interception capabilities for State and Federal anti-corruption agencies.

³⁰ *Inquiry into Law Enforcement Integrity Models* (February 2009), Recommendation 1 and *Examination of the Annual Report of the Integrity Commissioner 2007-08* (June 2009), Recommendation 1.

³¹ *Inquiry into Law Enforcement Integrity Models* (February 2009), Recommendations 2 and 3.

ACLEI remains committed to ensuring that resources are applied responsibly and directed innovatively to assuring for Government the integrity of law enforcement agencies that come under the Integrity Commissioner's jurisdiction.

Annexure One – Examples of potentially corrupt conduct in a law enforcement context

What is corruption?

'Corruption' is a nebulous term, and is frequently misunderstood and misapplied. Defining the term often seems to be counter-productive. ACLEI uses a descriptive approach to give the term meaning in the LEIC Act context.

Generally speaking, corruption involves improper actions or abuse of power and trust. Corruption entails conduct that subverts or misuses the legitimate functions of a public agency, or of a position within an agency, for criminal, political or personal purposes.

Identifying what makes conduct *corrupt* rather than simply *unlawful* or *unethical* is difficult, and it is important to consider individual circumstances. Corrupt conduct will often involve a breach of the law, but not all breaches of the law involve corrupt conduct. A person could also act lawfully, but corruptly. A person's intention in acting in a particular way is relevant, but is not always the determinative factor in deciding if conduct were corrupt.

'Corrupt conduct' is defined in section 6 of the LEIC Act as applying to three categories of improper activity by a public official with law enforcement functions, namely conduct that is engaged in for the purpose of:

- abusing his or her office as a staff member of a law enforcement agency;
- perverting the course of justice; or
- corruption of any other kind, having regard to the duties and powers of the staff member.

The LEIC Act definition is deliberately broad, because corruption may involve a broad range of misconduct or behaviour, and because corruption is adaptable – it changes to take advantage of new opportunities.

Further, a pattern of incidents of misconduct may be as important as a single major or criminal incident as it may show where there may be a wider problem of corruption risk. The present LEIC Act definition accommodates this approach.

What behaviours indicate a corruption issue?

The special role and powers of law enforcement agencies mean that corruption may manifest in particular ways within those agencies. Behaviour that may indicate a corruption issue in agencies with law enforcement functions can be categorised as follows:

Abuse of office

1. Conduct that seeks to gain profits or benefits for self or others
2. Conduct that misuses powers and discretions
3. Conduct that misuses law enforcement functions to support or assist criminal activity
4. Conduct that misuses information to support or assist criminal activity

Perversion of the course of justice

5. Conduct that sabotages the detection, investigation and prosecution of crimes

Corruption of other kinds, having regard to the duties and powers of the staff member

6. Conduct that may assist infiltration of an agency by criminal or corrupt groups
7. Conduct that places the reputation of the law enforcement agency at risk
8. Conduct that can make a staff member an accessory to corruption

Examples of behaviour that fall within these groups and indicate a possible corruption issue in law enforcement functions are listed on the following pages.

1. Conduct that seeks to gain profit or benefit for self or others

Profits and benefits do not need to be of a high value. They may include: money, drugs, sexual favours or any other items, and advantages or favours for other people or groups.

- accepting, receiving or seeking illegitimate rewards, 'kickbacks' and/or bribes for any service (including services that would normally be provided free of charge in the course of normal duties);
- providing preferential treatment in expectation of a reward;
- accepting, receiving or seeking rewards on behalf of another person, with or without that person's consent;
- accepting, receiving or seeking payment for any corrupt act;
- selling services or information to any person;
- extorting, or attempting to extort, benefits of any kind; or
- stealing money, property or drugs during arrests, execution of search warrants or other contact with the public.

2. Conduct that uses proper powers and discretions for an improper purpose

- misusing legitimate authority to apply discretion such as:
 - 'turning a blind eye' to the criminal actions of friends, family or criminal associates;
 - punishing or investigating other people without adequate cause;
 - favouritism in the discharge of duties (for example issuing fines or other penalties to one group, but not to another).
- misusing detention powers, such as unwarranted arrest or misuse of bail procedures;
- misusing surveillance, telephone interception or search powers;
- knowingly providing incorrect information in an affidavit to obtain access to intrusive powers;
- using powers to blackmail, extort or threaten individuals or organisations;
- excessive use of force (or threats) with a purpose to elicit information or prevent information from coming forward (see also 5); or
- using access to information for personal purposes.

3. Conduct that uses law enforcement functions to support or assist criminal activity

- participating in criminal activity, including using agency property, for example vehicles, uniforms, firearms or surveillance devices;
- offering or providing protection to criminal activity;
- offering or providing information to one or more criminal groups (see also 4);
- engaging in any activity that sabotages law enforcement efforts (see also 5);
- diverting law enforcement efforts or attention to, or away from, an activity in order to advantage one criminal group over another; or
- using poor investigation practices to prevent proper scrutiny.

4. Conduct that misuses information to support or assist criminal activity

This information may include:

- the personal or financial affairs of a colleague or law enforcement employee;
 - witnesses, informers or anyone connected with an investigation or prosecution;
 - criminal intelligence collected, including assumed identities;
 - detection or investigation methods;
 - criminal methods;
 - planned law enforcement actions or investigations (for example, 'tip offs' about a pending execution of search warrants or a timetable for border inspections);
 - information technology or computer databases (that may assist hackers); or
 - anything else that could provide an advantage to criminal activity.
- seeking or obtaining classified, sensitive, confidential or personal information, for any improper purpose;
 - improperly seeking or obtaining information about law enforcement investigations, methods, processes or plans;
 - providing or leaking information to unauthorised persons about individuals, witnesses, investigations or any aspect of law enforcement (including 'backroom' information not directly related to an investigation);
 - providing or leaking information to unauthorised persons that may assist them in a criminal act or that may advantage one criminal group over another; or
 - making unauthorised public comments about methodologies, practices or targets.

<i>Perversion of the course of justice</i>

5. Conduct that sabotages the impartial detection, investigation and prosecution of crimes

- agreeing to 'look the other way' when a crime is committed;
- interfering with evidence, including failure to properly collect or document evidence;
- planting, falsifying evidence or 'verballing' to get a conviction or to 'frame' a person;
- destroying evidence which could incriminate a suspect or clear another;
- withholding criminal intelligence or information from an investigation;
- laying false charges, not laying charges or laying lesser charges;
- committing perjury; or
- interfering with witness testimony or prosecution processes using bribery, extortion, blackmail or other promise, threat or inducement.

6. Conduct that may assist infiltration of an agency by criminal or corrupt groups

- 'grooming' or introducing others to corruption opportunities;
- forging qualifications or references to get a job or help place a person in an agency;
- favouritism or nepotism in recruitment, promotion or transfer;
- passing on information about recruitment or promotion practices; or
- leaking information about individuals engaged in investigations, joint operations, taskforces, etc.

7. Conduct that places the reputation of the law enforcement agency at risk

- failure to declare conflicts of interest or improper associations;
- failure of supervisor to manage or treat conflicts of interest raised or declared by staff;
- improperly associating with criminals;
- engaging in criminal or suspect activity, such as illicit drug-taking or heavy gambling;
- using the uniform to support private business, for example, to imply law enforcement support for a questionable activity; or
- using a police vehicle, firearm or other law enforcement-related property for private or illegitimate purposes.

8. Conduct that can make a staff member an accessory to corruption

- accepting a 'share' of profit or benefits from others' corrupt activities;
- failing to report corrupt activity or misconduct;
- attempting to cover up or hide misconduct or corrupt behaviour of self or others; or
- obstructing inquiries of the Integrity Commissioner and others responsible for investigating corruption and misconduct.

Annexure Two – Example criteria for assessing the need for independent integrity oversight of Commonwealth law enforcement agencies

Overview

Influence and authority

1. Reputation
2. Functions and powers

Type of work

3. Corruption attractors

The working environment

4. Supervision
5. Culture

Operational risks

6. Exposure
7. Joint operations
8. Displaced activity

Organisational environment

9. Organisational change

Influence and authority

1. Reputation

- Is public confidence important for the agency to be able to fulfil its functions?
 - Does the agency depend on information from individuals or the public?
 - Does the community need to be confident the agency will act fairly and justly if they report concerns?
- Does the agency need the confidence of other agencies or organisations?
 - Does the agency depend on information from other agencies?
 - Does the agency need cooperation from other agencies?

2. Functions and powers

- Does the agency have 'law enforcement functions', as defined in section 5 of the LEIC Act? For example, does it,
 - have responsibility for the collection or handling of evidence;
 - investigate or prosecute crimes or breaches of the law; or
 - deal with criminal intelligence or confidential information?
- Does the agency have special powers to support their law enforcement functions? For example, does its members,
 - carry firearms or have authority to use force;
 - have search and/or detention powers; or
 - have intrusive powers (telecommunications interception, surveillance devices, controlled operations, assumed identities)?

Type of work

3. Corruption attractors

- Do staff members have access to saleable or valuable commodities, such as
 - information;
 - intelligence;
 - licensing powers or other regulatory functions;
 - the ability to compromise the collection of evidence; or
 - property?
- Does the agency perform functions that would make it a target for infiltration or compromise by organised crime? For example:
 - could staff assist with money laundering;
 - could staff assist with identity fraud;
 - could staff assist with any other activity of an organised criminal group;
 - do staff deal with drug law enforcement;
 - do they have access to material useful for 'green-lighting' operations or for counter-surveillance, for example,
 - restricted information?
 - protected methodologies?
 - operational intelligence (tip-offs)?
 - influence in operational decision-making?
 - do they deal with the importation supply line;
 - are they a gatekeeper or agency that should detect anomalies;
 - do operational methods include the interdiction or disruption of criminal activities; or
 - do they deal in collection of evidence of crimes?

The working environment

4. Supervision

- Is the work characterised by lack of supervision and based on trust?
- Do functions carry wide discretions to act or not act?
- Are staff vulnerable to opportunistic crime such as access to portable-and-valuable commodities or confidential information?
- Are transactions within and between operations typified by 'trust' relationships?

5. Culture

- Could the internal culture make the agency, or individuals within it, vulnerable to cover-ups, whether to 'protect mates' or the agency?
- Are staff of the agency vulnerable to 'noble cause' or 'process' corruption?
 - Are they a high profile or high performance area, where there may be pressure to achieve results 'by any means'?
- Are there independent or isolated functional or geographic groups where local sub-cultures or loyalties could arise?

Operational risks

6. Exposure

- Does the nature of the work bring individuals into contact with criminal elements?
- If the work is carried out offshore, does it occur in countries where corruption is commonplace?

7. Joint operations

- Does the agency engage in overlapping or cooperative work such as taskforces with other Australian or international agencies where there may be:
 - an 'integrity gap' - one group subject to one accountability regime, and the other subject to a different or lesser regime; or
 - a gap or lack of clarity in supervision allowing corruption to occur?

8. Displaced activity

- Could 'displaced activity'* occur in the agency, as a result of corruption resistance in other agencies?
 - Are there partner agencies whose integrity regimes are strong or have been recently strengthened?
 - Could this agency provide an entrée to another related agency with stronger integrity regimes?

*Strengthening the integrity regime in one area may drive organised crime and corrupt officials to look for weaknesses in other related areas - corruption is highly adaptable.

Organisational environment

9. Organisational change

- Is the agency undergoing significant change or expansion?
 - Has or will the agency taken on functions and/or staff from other agencies in changes to the machinery of government?
 - Is the agency implementing new functions or policy?
 - Is or will there be a significant intake of new staff and/or new functions as a result of increased funding?
 - Is the agency changing direction or shedding staff?

Annexure Three – A tiered model for jurisdiction

Tier 1 Agencies with significant law enforcement functions, close operational ties and high inherent corruption risks

Tier 2 Other agencies with important law enforcement functions and lower inherent corruption vulnerability

Tier 3 Other Commonwealth agencies

	How an investigation or inquiry may be commenced*						Addressing Corruption Risk		
	CEO must notify corruption issues to ACLEI (s 19)	CEO may refer corruption issues to ACLEI	Minister may refer a corruption issue (s 18)	Any other person may refer a corruption issue (s 23)	Integrity Commissioner on own initiative (s 38)	Minister may request a public inquiry (s 71)	Corruption risk assessment**	Providing corruption prevention advice**	Awareness-raising about corruption risks
Tier 1	✓		✓	✓	✓	✓	✓	✓	✓
Tier 2		✓	✓	Whistle-blowers only		✓	On request	✓	✓
Tier 3								On request	On request

* The Integrity Commissioner should give priority to corruption issues that have a nexus to the law enforcement character of the agency.

** To ensure detection and prevention systems are appropriately targeted and resourced.