



Australian Government

**Australian Commission for
Law Enforcement Integrity**

**Review of Australian
Privacy Law
(Discussion Paper 72)**

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

December 2007

1. The Integrity Commissioner and ACLEI

The *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) commenced on 30 December 2006. The LEIC Act establishes the statutory office of Integrity Commissioner.

The Integrity Commissioner is supported by an independent agency, the Australian Commission for Law Enforcement Integrity (ACLEI). ACLEI consists of a total of ten investigative, legal, policy and corporate staff.

The Integrity Commissioner's role is to:

- detect, investigate and prevent corruption in law enforcement agencies;
- maintain and improve the integrity of staff members of law enforcement agencies; and
- collect and process intelligence on corruption in law enforcement.

Presently those subject to the scrutiny of the Integrity Commissioner under the LEIC Act are staff members of the Australian Federal Police, the Australian Crime Commission and the former National Crime Authority. Other agencies may be added by regulation.

The Integrity Commissioner is to give priority to dealing with serious corruption and systemic corruption.

ACLEI receives information about potential corruption issues from various sources. The LEIC Act requires the Heads of the ACC and the AFP to notify the Integrity Commissioner of corruption issues that relate to their agency.

Corruption issues can be investigated in a number of ways, including:

- in private;
- covertly;
- inquisitorial hearings held in public or in private;
- referring matters to other agencies; and
- joint investigations with other government agencies, or with an integrity agency of a State or Territory.

ACLEI's powers include:

- coercive information-gathering, such as in response to Notices to produce evidence or information, or under oath or affirmation in response to a summons;
- telecommunications interception;
- electronic and physical surveillance;
- controlled operations;
- assumed identities;
- search warrants;
- arrest;
- scrutiny of financial transactions; and
- passport confiscation.

ACLEI may also collect intelligence about corruption in support of its functions.

A special challenge in ACLEI's work is that those subject to the inquiries of the Integrity Commissioner are themselves well-versed in law enforcement methodologies, and may be skilled at countering them to seek to avoid scrutiny.

2. Background to this submission

ACLEI welcomes the opportunity to present a submission to the Australian Law Reform Commission (ALRC), made in response to Discussion Paper 72 (DP 72) relating to the ALRC's Review of Australian Privacy Law.

This submission responds specifically to Proposals 34-3 and 34-4, which are found on page 990 of DP 72 (Volume 2), and which are reproduced below.

Proposal 34-3 The Privacy Act should be amended to apply to the Integrity Commissioner in respect of the administrative operations of his or her office.

Proposal 34-4 The Integrity Commissioner, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines to ensure that the personal information handled by the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity is adequately protected.

Since DP 72 was published, the Integrity Commissioner, Mr Philip Moss, has had the benefit of discussing the Privacy Law Review with ALRC Commissioner, Prof. Les McCrimmon.

The Integrity Commissioner was pleased to have had the opportunity to outline both ACLEI's functions and the steps ACLEI has taken to manage, and provide accountability for, privacy of personal information. The Integrity Commissioner has considered carefully the specific matters raised with him by Prof. McCrimmon.

3. ACLEI's privacy management strategy

As noted in DP72, the acts and practices of ACLEI, including those of the Integrity Commissioner, are exempt from investigation by the Privacy Commissioner under the Privacy Act. This situation also means that ACLEI is not bound by the Information Privacy Principles of the Privacy Act.

The Integrity Commissioner recognises the importance of appropriately handling personal information. As far as possible, the Information Privacy Principles and the Privacy Commissioner's Guidelines form an important part of ACLEI's management of personal information.

The Principles and Guidelines inform the Integrity Commissioner's decisions about collecting, storing, updating, using and disclosing personal information.

The collection of personal information by ACLEI is already limited by the objects of the LEIC Act (section 3), and the functions of the Integrity Commissioner contained in the LEIC Act (section 15).

Other influences on ACLEI's handling of personal information include ACLEI's stringent confidentiality obligations under sections 207-211 of the LEIC Act, the applicable secrecy provisions of other specific Acts under which ACLEI operates, and section 70 of the Crimes Act, which creates an offence for unauthorised disclosure of information by public officers.

All of ACLEI's Information Technology, file management and document destruction systems are rated at a 'protected' level (as a minimum), offering a high degree of assurance against unauthorised access or disclosure of personal information that may be held by ACLEI. In addition, all ACLEI staff positions are security assessed.

As discussed below, ACLEI is establishing an Internal Audit Committee to oversee and monitor the implementation of key governance practices, including management of personal information.

4. Characterising ACLEI

The ALRC has specifically asked ACLEI to provide information about the nature of ACLEI and its work so that the ALRC might better understand where ACLEI ‘fits’, and what agencies it might be compared to or distinguished from.

ACLEI is the first and only agency at Commonwealth level that is focussed entirely on detecting and investigating corruption in law enforcement. While it may be tempting to liken ACLEI to other agencies with independent oversight functions, direct comparisons are not straightforward, as may be evident from Table One.

Table One: Broad comparison of oversight agency functions and powers

Inspector-General of Intelligence and Security (IGIS)	Commonwealth Ombudsman	Integrity Commissioner
<p>Main role:</p> <ul style="list-style-type: none"> -Oversees the activities of the six agencies in the Australian Intelligence Community to ensure that they act legally and with propriety, comply with Ministerial guidelines and directives, and respect human rights. 	<p>Main role:</p> <ul style="list-style-type: none"> -Focuses on maladministration in, and investigates complaints about, matters of administration in government agencies. 	<p>Main role:</p> <ul style="list-style-type: none"> -Detects, investigates and prevents corruption
<p>Main function:</p> <ul style="list-style-type: none"> -Conducts compliance inspections -Receives and investigates complaints from members of the public or the Minister -Initiates inquiries 	<p>Main function:</p> <ul style="list-style-type: none"> -Receives and investigates complaints from members of the public -Initiates inquiries 	<p>Main function:</p> <ul style="list-style-type: none"> -Evidence and intelligence gathering, including covert investigations, surveillance, data-mining, public interest disclosures from ‘whistleblowers’
<p>Main powers:</p> <ul style="list-style-type: none"> -Coercive information-gathering powers -Power of entry to agency premises. 	<p>Main powers:</p> <ul style="list-style-type: none"> -Coercive information-gathering powers 	<p>Main powers:</p> <ul style="list-style-type: none"> -Coercive information-gathering powers -Hearing power (inquisitorial power) -Power of entry to agency premises -Covert law enforcement investigation powers (physical and electronic surveillance, telecommunications interception, assumed identities, controlled operations)

As highlighted by Table One, the four critical differences between ACLEI and the other selected oversight agencies lie in:

- the Integrity Commissioner's coercive inquisitorial power which may be exercised in a public or a private hearing;
- ACLEI's law enforcement function and intrusive powers;
- the special nature of those who may fall subject to ACLEI's investigations – law enforcement officers engaged in corruption, but who are also skilled in counter-surveillance and other law enforcement methodologies; and
- a focus on achieving prosecutions and disciplinary outcomes, rather than remedies for complainants.

The functions, roles, powers and methodologies of the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman are unique in their own ways, and distinguish those agencies from the Integrity Commissioner and ACLEI.

While ACLEI is a law enforcement agency, similar in some ways to the Australian Federal Police (AFP), in practice ACLEI is different to the AFP because of the Integrity Commissioner's integrity oversight role and inquisitorial power.

Another comparison sometimes made of ACLEI is with the Australian Crime Commission (ACC). In many ways, the ACC is a good comparison. While ACLEI uses its powers against potential corruption in law enforcement agencies, the ACC deploys similar powers and methods to investigate, amongst other things, organised crime. Significantly, the ACC also has an inquisitorial ('examination') power (Part II, Division 2, *Australian Crime Commission Act 2002*) that is comparable to ACLEI's.

5. Reasons for ACLEI's exemption

As noted, the acts and practices of ACLEI are exempted from the Privacy Act. This exemption recognises three imperatives that impact on ACLEI's ability to operate effectively:

- ensuring ACLEI's inquisitorial power, which may be used to gather intelligence about a corruption issue, is not subject to unintended fetter;
- restricting possibilities for counter-surveillance tactics to be used against ACLEI that might otherwise frustrate ACLEI's operations, having particular regard to the law enforcement skills, knowledge, and access to information of those who may be subject to corruption inquiries; and
- ensuring there are no impediments to the voluntary flow of information from any source that might identify corruption.

The ALRC has not suggested that the Privacy Act should apply to ACLEI's investigative or intelligence operational aspects.

6. Can a partial exemption work for ACLEI?

The ALRC proposes that the Privacy Act be amended to apply to the Integrity Commissioner in respect of the administrative operations of ACLEI (Proposal 34-3).

After consulting with a number of agencies and giving consideration to alternative ways of protecting the privacy of personal information that relates to individuals, the Integrity Commissioner has formed the view that there are sound policy reasons that should underpin a reassessment of Proposal 34-3. The first three points (below) suggest why it would be detrimental to ACLEI to adopt the proposal, and the fourth (and final) point suggests that there would be no practical detriment to individuals to retaining the current arrangements.

First, the proposal would be impractical in ACLEI's case. Because of ACLEI's investigative and intelligence-gathering methodologies, it is not always possible to distinguish between the 'administrative' and 'non-administrative' operations of ACLEI. In many cases it would be artificial to try to make the distinction.

For example, matters relating to ACLEI's covert operations have a personnel and financial management component. From an operational perspective, it is desirable that personal information relating to those matters is not subject to discovery, or to constraint about its use or disclosure. ACLEI's view is that decisions about disclosure are best handled by having regard to the confidentiality requirements of the LEIC Act.

While this problem may affect other law enforcement agencies that use covert methodologies, including paid informants, in the case of ACLEI the risk of compromise is increased because of the counter-surveillance knowledge of targets of ACLEI's investigations, who are themselves trained in similar methodologies.

Secondly, in developing its personnel procedures, ACLEI has considered that it may itself become a target for infiltration or compromise. It is undesirable to create a right that 'administrative' records relating to an employee or former employees should be available to that person, or that the use or disclosure of those records should be constrained.

Thirdly, ACLEI's potential sources of information about corruption issues include a number of government organisations at State, Federal and international levels. In some cases, the preparedness of those agencies to volunteer information to ACLEI, when it is not compelled to do so by legislation, could be adversely affected if ACLEI's privacy exemption were modified.

Finally, there may be little to be gained by accepting the current proposal that is not already achieved in other ways. The collection of information by ACLEI is already self-limiting because of the objects of the LEIC Act (section 3), and the functions of the Integrity Commissioner contained in the LEIC Act (section 15). The confidentiality provisions of the LEIC Act are a sufficient incentive to ensure that personal information (including ACLEI's 'administrative' operations) is held securely and not disclosed without authority (sections 207 and 208).

In practice, ACLEI will collect little personal information of an administrative nature. That information will be limited in scope and affect very few people – primarily employees and former employees. Therefore, the risk of compromising the privacy of an individual's personal information is very small.

In summary, adopting Proposal 34-3 would, in ACLEI's view, be disproportionate to the size of the issue, impractical in many ways, and pose a risk to the operational effectiveness of ACLEI, its propriety, and the personal safety of some employees and others who give assistance to ACLEI. In any case, the Integrity Commissioner intends to adopt additional measures (see below) that will provide privacy protection to those most likely to be affected.

7. Protecting privacy of personal information

The ALRC proposes that the Integrity Commissioner, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines to ensure that the personal information handled by the Integrity Commissioner and ACLEI is protected adequately (Proposal 34-4).

The Integrity Commissioner accepts this proposal and has commenced discussions with the Office of the Privacy Commissioner to begin development of information-handling guidelines for ACLEI.

As mentioned, the Integrity Commissioner intends to refer monitoring of the privacy guidelines, once adopted, to ACLEI's Internal Audit Committee.