



**Australian Government**

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**Australian Commission for  
Law Enforcement Integrity**

**Standing Committee on Social Policy  
and Legal Affairs**

*Inquiry into  
the Crimes Legislation Amendment  
(Powers and Offences) Bill 2011*

**Submission by the  
Australian Commission for  
Law Enforcement Integrity**

**13 January 2012**

## **1. Introduction**

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Standing Committee on Social Policy and Legal Affairs (the Committee) *Inquiry into the Crimes Legislation Amendment (Powers and Offences) Bill 2011* (the Bill).

This submission addresses Schedule 4 of the Bill, which intends to amend the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) to enhance ACLEI's ability to investigate corruption; improve the operation of provisions relating to arrest warrants; search warrants, and notices to produce and summons; and provide consistency between non-disclosure regimes in the *Privacy Act 1988* and the LEIC Act. Among the proposed amendments is the introduction of contempt arrangements relating to hearings conducted by the Integrity Commissioner.

The Explanatory Memorandum to the Bill sets out the Government's policy basis for proposing these amendments to the Parliament. This submission aims to assist the Committee by providing more detailed and specific information.

Part 2 of this submission provides background about ACLEI's role and responsibilities and about the role of coercive powers in corruption investigations.

Part 3 provides ACLEI's comments, based on its experience, about the amendments proposed in Schedule 4 of the Bill, with particular emphasis on the proposed introduction of contempt arrangements.

## **2. Role and responsibilities of ACLEI**

### ***Establishment***

The office of the Integrity Commissioner, and ACLEI, are established by the LEIC Act.

The objects of the LEIC Act (at section 3) are:

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

Those agencies subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission, the Australian Federal Police and the former National Crime Authority. The Australian Customs and Border Protection Service was added to the Integrity Commissioner's jurisdiction by regulation from 1 January 2011 and by primary legislation<sup>1</sup> from 6 December 2011.

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<sup>1</sup> *Crimes Legislation Amendment Act (No. 2) 2011*

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### **Role**

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

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

ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or the administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed. Accordingly, a feature of the LEIC Act is its focus on measures to remedy deficient practices that can give rise to corruption. The Integrity Commissioner is authorised to explore such issues in investigations and reports.

### ***The threat of corruption in law enforcement***

There is a particular risk that corruption may arise in law enforcement environments, unless appropriate counter-measures are in place.

Law enforcement necessarily entails activities with high corruption risks, such as:

- dealing direct with criminals;
- seizing and handling evidence, property, firearms and illicit drugs;
- discretion over the investigation, charging and arrest of individuals; and
- holding or having access to law enforcement information data sources and intelligence which may be useful to criminal groups.

Law enforcement agencies' roles in fighting serious and organised crime, or their role of protection at the border, places them at particular risk of infiltration and compromise by enterprises that seek to undermine legitimate efforts to detect and disrupt criminal activity. The Integrity Commissioner uses the metaphor 'the corruption handshake' to describe the possible relationship between organised crime and a corrupt staff member of a law enforcement agency.

The ACC's report *Organised Crime in Australia 2011* notes the ongoing threat of corruption of public sector employees who work in areas that can facilitate the illegal activities of organised crime groups.

*"...This [threat category] also includes people with access to information on the activities of other organised crime groups and law enforcement and areas which can provide identification documents such as driver licences and other permits. Improper or inappropriate relationships with informants, as well as poor management of experienced criminals, remain corruption risks for law enforcement officers."<sup>2</sup>*

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<sup>2</sup> Australian Crime Commission, *Organised Crime in Australia 2011 Report, Convergence with terrorism, corruption and political instability*, <http://www.crimecommission.gov.au/publications/organised-crime-australia/organised-crime-australia-2011-report>, accessed 9 January 2012

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By combating corruption in Australia's primary law enforcement and border protection agencies, ACLEI helps to guard them against infiltration and compromise by serious and organised crime. In support of this aim, ACLEI engages with the agencies in the Integrity Commissioner's jurisdiction to detect corruption risk and investigate possible corrupt conduct, provides information to disrupt corrupt activity and assists them to develop detection and deterrence measures.

***Independence***

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. ACLEI is within the Minister for Home Affairs and Justice's portfolio responsibilities.

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

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

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

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

- is appointed by the Governor-General and cannot be removed arbitrarily;
- may not hold office for more than five years;
- can commence investigations on his or her own initiative; and
- can make public statements, and can release reports publicly.

***Receiving information about corruption***

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

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue, irrespective of the source of that information.

In addition, the LEIC Act enables the Minister to refer corruption issues to the Integrity Commissioner. Any other person, including members of the public or other government agencies, may also refer a corruption issue. In addition, the Integrity Commissioner may deal with corruption issues on his or her own initiative.

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

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

***Investigation options***

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI's jurisdiction. The Integrity Commissioner is not expected to investigate every corruption issue that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner's role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed properly.

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

- investigate the corruption issue;
- investigate the corruption issue jointly with another agency;
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI);
- refer the corruption issue to another agency, such as a State integrity agency, the AFP, or another Government agency, for investigation; or
- take no further action.

Section 27 of the LEIC Act sets out the matters to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue.

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement, for example if an independent investigation were beneficial, or if the use of ACLEI's coercive investigation powers were desirable.

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act.

***Investigation powers***

Corruption is a clandestine activity, and its practitioners strive to remain undetected. An additional challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be well-versed in standard law enforcement methods, and may be skilled at countering them in order to avoid scrutiny. As a consequence of these challenges, ACLEI has access to a range of special law enforcement powers for the purpose of corruption investigations. These information-gathering powers are set out in Part 9 of the LEIC Act.

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

- coercive information-gathering powers
  - notices to produce information, documents or things;
  - summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things;

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- intrusive information-gathering (covert);
  - telecommunications interception;
  - electronic and physical surveillance;
  - controlled operations;
  - assumed identities;
  - scrutiny of financial transactions; and
  - access to specialised information databases for law enforcement purposes;
- search warrants;
- right of entry to law enforcement premises and associated search and seizure powers; and
- arrest (relating to the investigation of a corruption issue).

***Accountability***

A variety of safeguards are in place to ensure that the powers and authority provided by Parliament to the Integrity Commissioner are used lawfully, fairly and appropriately. A number of these safeguards take the form of external checks, while others are administered by the Integrity Commissioner as ACLEI's head of agency. ACLEI's performance against these safeguards is reported in chapter 9 of the Integrity Commissioner's annual report.

The Parliamentary Joint Committee on the Australian Commission for Law Integrity (the Committee), reports to both Houses of Parliament on matters relating to ACLEI. The Committee comprises five Members of Parliament and five Senators. The Committee monitors and reviews the Integrity Commissioner's performance of his or her functions, and examines each annual report and any special reports produced by the Integrity Commissioner.

***Background to coercive powers***

Various legislation provides for Australian law enforcement agencies to use a range of methods and powers to investigate crime. ACLEI also has access to those powers for the purposes of corruption investigations conducted by the Integrity Commissioner.

However, as is the case with organised crime—to which it is often linked—the investigation of corruption presents specific practical difficulties. An observed characteristic of corruption is that it is dynamic and manifests in new ways to take advantage of emerging opportunities and to adapt to changes in the deterrence regime. Corruption seeks to remain undetected, and practitioners may be skilled at avoiding detection. It is in the interests of the parties in a corrupt partnership to keep the nature of their relationship secret. Coercive powers provide the Integrity Commissioner with an additional tool to overcome the challenges of investigating corruption, including that of investigating law enforcement officers who are themselves familiar with detection or surveillance methods and investigation techniques.

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When a witness has claimed a 'direct use indemnity'<sup>3</sup>, information gathered using coercive powers cannot be used in a prosecution. However, the purpose of a corruption investigation is not only to prosecute corrupt conduct. Information or intelligence gathered by coercive means may still be used to remove a person from a position of risk, dismantle or disrupt a corrupt enterprise, or to otherwise protect an agency from compromise.

In addition, as with other information-gathering methods, coercive powers assist ACLEI to generate 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.

For similar reasons, coercive powers are available to other anti-corruption agencies across Australia and also to the ACC for the purpose of investigating serious and organised crime.

***Information-gathering hearings***

In information-gathering hearings, the Integrity Commissioner can require a witness to attend before him or her and answer questions, even if the witness's answers may be self-incriminating. A witness may be the person under investigation, another employee of a law enforcement agency or any other person who may be able to provide information that could assist an investigation.

An information-gathering hearing is an investigative tool, and is fact-finding in nature. The purpose of a hearing is not to decide an issue or assign responsibility, but to progress an investigation, for instance by the discovery of information that may lead to further investigative action being taken. Obtaining intelligence and corroborative evidence prior to and after a hearing remains a critical part of the investigative process. A hearing is one part of an investigation strategy that may include a range of other investigative methods, for example voluntary interviews or collection of evidence and intelligence through covert means.

Accordingly, a witness does not appear to support a particular case, or to defend him or herself, but to provide information. The Integrity Commissioner is not required, before conducting a hearing, to disclose the purpose of the investigation or the extent or nature of the evidence already acquired if to do so would prejudice an investigation. The rules of evidence that apply in a court of law do not apply in coercive hearings.

In addition, the Integrity Commissioner may issue orders to prevent disclosures being made by witnesses about the nature and existence of ACLEI hearings. This measure is designed to prevent collusion between witnesses and other forms of compromise that may arise, were the fact of an ACLEI investigation to become known. Non-disclosure directions are also one of the means by which ACLEI may protect whistleblowers.

In combination with other investigation methods, coercive information-gathering hearings are an important and effective tool to expose corrupt methodologies and identify other witnesses and corrupt players.

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<sup>3</sup> It is an offence not to comply with a notice or summons issued by the Integrity Commissioner and not to answer questions or take an oath at a hearing. If the Integrity Commissioner requires a person to give information or produce documents or things that may incriminate him or her, that person may apply for a 'direct use indemnity' beforehand.

With limited exceptions, information provided by a witness who has claimed a 'direct use indemnity' is not admissible in evidence against that person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. The 'direct use indemnity' does not apply to disciplinary proceedings or to proceedings under Proceeds of Crime legislation.

### **3. Comments about the *Crimes Legislation Amendment (Powers and Offences) Bill 2011***

ACLEI was consulted in the drafting of the Bill. ACLEI is confident that the amendments will support the Integrity Commissioner in investigating corrupt conduct in the Australian Crime Commission, the Australian Customs and Border Protection Service and the Australian Federal Police, and in providing assurance to Government about the integrity of the staff of these agencies.

Schedule 4 of the Bill proposes a number of changes to the LEIC Act that would improve the effectiveness of the Integrity Commissioner's investigations. These changes seek to enhance the intended operation of the LEIC Act.

ACLEI supports the amendments for the reasons already outlined in the Explanatory Memorandum to the Bill. These comments are intended to provide additional context, drawn from ACLEI's operational perspective.

#### ***Contempt mechanism***

At item 29, the Bill introduces a new arrangement under the LEIC Act, namely to provide the Integrity Commissioner with a mechanism to refer a person in contempt of ACLEI to the Federal Court or Supreme Court of a State or Territory, to be dealt with as if the person were in contempt of that court. The purpose of a contempt referral power is to speed up the management of any non-compliance with the Integrity Commissioner's coercive powers.

ACLEI's investigations increasingly involve dealing with 'the corruption handshake'—the relationship between organised crime and corrupt law enforcement personnel. As a consequence, the likelihood that ACLEI will encounter uncooperative witnesses is expected to increase.

From a policy perspective, it is desirable to ensure that the Integrity Commissioner's coercive powers are supported by appropriate measures to ensure their effectiveness. In ACLEI's view, the proposed provisions are consistent with the purpose for which the Integrity Commissioner's coercive information-gathering powers were originally granted and comprise a necessary deterrent to allow the effective use of these powers.

The Bill includes protections against the misuse of the contempt mechanism. For example, the requirement to inform a person of the intention to refer his or her conduct to a court for contempt ensures that fair warning is given of the consequences of contemptuous behaviour, and affords a further opportunity to comply. The Bill also provides for the person to receive a copy of the certificate which the Integrity Commissioner must provide to the court, at the time that it is provided to the court.

The mechanism proposed allows proceedings to be brought to a court in a direct way and to be heard quickly, thereby facilitating the continued investigation of a corruption issue. In addition, a contempt mechanism affords options for resolution that may not be available in a criminal prosecution, for example the opportunity to remedy the contempt by complying. When, for operational reasons, it may be necessary to maintain the confidentiality of an investigation, it would be also be possible for the court hearing to be held in camera.

ACLEI supports the introduction of the proposed contempt arrangements and will make appropriate arrangements with law enforcement and other agencies to implement the new regime.



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**Other amendments**

Other proposed changes to the application of the Integrity Commissioner's existing coercive and information-gathering powers are listed below.

At items 8 and 9 of the explanatory memorandum, the Bill proposes measures to improve the administration of notices to produce, including aligning requirements between law enforcement agency staff members and other persons and providing for the Integrity Commissioner to specify the manner in which a person may comply with a notice. ACLEI considers that these measures would simplify the notices regime, thereby enhancing the efficiency of investigations. In addition, the measures would introduce flexibility for notice recipients to assist them to comply with their obligations, and for the Integrity Commissioner to ensure that he or she received information relevant to the investigation in the most appropriate and effective form.

At items 8 and 23, as a new safeguard to ensure the appropriate application of coercive powers, the Bill introduces a threshold for the issue of notices and summonses, requiring the Integrity Commissioner to have reasonable grounds to suspect that the required evidence, information, documents or things will be relevant to the investigation of a corruption issue or the conduct of a public inquiry. ACLEI supports this clarification, which aligns with the standard required of other law enforcement agencies in similar instances.

At item 10, the Bill introduces a non-disclosure regime in relation to notices to produce, consistent with that which already exists for summonses and information-gathering hearings. This change is consistent with a suggestion made by the Parliamentary Joint Committee on ACLEI in its report into the Examination of the Annual Report of the Integrity Commissioner 2008-2009, tabled in May 2010.

*"2.39 The committee understands that the capacity to keep confidential certain information in order to protect investigations from compromise is critical. At the same time, the committee notes that the holding of hearings to receive evidence and/or documents is a costly and time consuming process. The committee is of the view, therefore, that the decision to hold a hearing should be determined by the need to take evidence in person and not to remedy an apparent anomaly in the existing legislation.*

*2.40 The committee supports the Integrity Commissioner's current approach as a stop-gap measure. However, the committee suggests that other options—including amending the legislation to incorporate a provision enabling the Integrity Commissioner to prohibit disclosure of information invoked under sections 75 and 76 of the LEIC Act—be given consideration."<sup>4</sup>*

Item 26 clarifies the application of legal professional privilege to information and documents provided to ACLEI in the public interest. This clarification should help to encourage production of documents to ACLEI on the grounds that such documents or communications are protected, to the extent possible, from onward disclosure to third parties.

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<sup>4</sup> Parliamentary Joint Committee on ACLEI, Examination of the Annual Report of the Integrity Commissioner 2008-2009, [http://www.aph.gov.au/Senate/Committee/aclei\\_ctte/annual/2009/report/index.htm](http://www.aph.gov.au/Senate/Committee/aclei_ctte/annual/2009/report/index.htm), accessed 12 January 2012.

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Item 27 simplifies a witness' ability to utilise the privilege against self-incrimination by removing the requirement to claim a 'direct use indemnity' before responding to individual questions at a coercive information-gathering hearing. Since not all witnesses choose to be assisted by a legal representative when they attend a hearing, this measure would ensure witnesses—who may be unfamiliar with the privilege, lack confidence to claim such a privilege, be confused or distressed—give their evidence in an unambiguous setting. In addition, the change would smooth the conduct of hearings by minimising disruptions and uncertainties in relation to the privilege, for example regarding the impact or direction of particular lines of questioning.

At items 33 to 40, the Bill proposes administrative improvements relating to the issue of arrest warrants and associated search and seizure powers. These changes clarify who may use force in searching persons or premises and what items may be seized when executing search warrants issued by the Integrity Commissioner. ACLEI considers that these changes will simplify and support the effective administration of warrants.

Other measures in the Bill are consequential changes or seek to clarify or correct drafting issues.

***Summary***

ACLEI considers that, as a package, the amendments proposed in the Bill are useful and appropriate improvements to the operation of the LEIC Act and would strengthen ACLEI's ability to investigate corrupt conduct.