



Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity

Inquiry into the Operation of the *Law Enforcement
Integrity Commissioner ACT 2006*

Final report

July 2011

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Recommendations

Recommendation 1

2.27 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to establish a 'second tier' to the Act. Agencies with a law enforcement function included in this second tier would be subject to limited ACLEI oversight, under which the head of an agency, or the minister responsible for the agency, may refer a corruption issue, on a voluntary basis, for consideration by the Integrity Commissioner. The Integrity Commissioner should also have the power to commence an investigation or inquiry into a corruption issue in a second tier agency on his or her own initiative.

Recommendation 2

2.64 The committee recommends that ACLEI's second tier jurisdiction should initially comprise the Australian Taxation Office, the Australian Transaction Reports and Analysis Centre, CrimTrac, the Australian Quarantine and Inspection Service and the Department of Immigration and Citizenship.

Recommendation 3

2.68 The committee recommends that the operation of a second tier in the *Law Enforcement Integrity Commissioner Act 2006* and the list of agencies prescribed in that tier be reviewed two years after initial establishment. This review should include consideration of whether any tier two agencies may more appropriately be subject to tier one prescription. Similar reviews should subsequently be conducted at two year intervals.

Recommendation 4

2.83 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to ensure that secrecy and confidentiality provisions pertaining to law enforcement agencies within ACLEI's jurisdiction do not prevent the Integrity Commissioner from receiving information necessary to the investigation of a corruption issue.

Recommendation 5

2.86 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so that the period of appointment of the Integrity Commissioner may be extended once, beyond the five year period of appointment, for a period of up to two years by the Governor-General on recommendation of the Minister, with the approval of the committee. Any such extension to the period of appointment should apply only to a serving Integrity Commissioner and should be approved no less than three months before the expiry of the current period of appointment.

Recommendation 6

3.27 The committee recommends that the Integrity Commissioner, the Commonwealth Ombudsman, the Public Service Commissioner, the Auditor-General and the Attorney-General's Department develop a more detailed and comprehensive definition of corruption for the purposes of the *Law Enforcement Integrity Commissioner Act 2006*. A proposed definition should be circulated for public consultation, including this committee, no later than November 2011.

Recommendation 7

3.63 The committee recommends that ACLEI and the Australian Public Service Commission continue to collaborate in the development of ethics training provided to public servants to include corruption prevention using ACLEI's specialised experience and knowledge.

Recommendation 8

3.73 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to provide a mechanism by which the Public Service Commissioner, with the consent of the Integrity Commissioner, could request assistance, including on behalf of any head of a Commonwealth agency, in investigating a serious corruption issue. Such a request would be made after consideration of whether ACLEI's unique experience and powers meant that ACLEI could provide greater investigatory value than the Australian Federal Police. Furthermore, to avoid overburdening ACLEI to the detriment of its primary law enforcement focus, such an arrangement should be funded by the requesting agency.

Recommendation 9

3.91 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to include a 'more conveniently dealt with' clause that would enable the Integrity Commissioner to refer to the Commonwealth Ombudsman issues that are not, or through the course of investigation, it is discovered are not, corruption issues but which do relate to misconduct.

Recommendation 10

3.130 The committee recommends that the Australian Government conduct a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity commission with anti-corruption oversight of all Commonwealth public sector agencies, taking into account the need to retain the expertise of ACLEI in the area of law enforcement.

Acronyms and Abbreviations

ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
ANAO	Australian National Audit Office
APS	Australian Public Service
APSC	Australian Public Service Commission
AQIS	Australian Quarantine and Inspections Service
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEO	Chief Executive Officer
Committee	Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity
Customs	Australian Customs and Border Protection Service
DAFF	Department of Agriculture, Fisheries and Forestry
DIAC	Department of Immigration and Citizenship
FMA Act	<i>Financial Management and Accountability Act 1997</i>
ICAC	New South Wales Independent Commission Against Corruption
ICAC Act	<i>Independent Commission Against Corruption Act 1988 (NSW)</i>
LEIC Act	<i>Law Enforcement Integrity Commissioner Act 2006</i>
HOCOLEA	Heads of Commonwealth Operational Law Enforcement Agencies
NCA	National Crime Authority
Public Service Act	<i>Public Service Act 1999</i>

Chapter 1

Introduction

Terms of reference

1.1 On 14 May 2009 the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (the committee) initiated an inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) and its regulations, pursuant to the committee's duties set out in subsection 215(1)(d) of the LEIC Act.

1.2 In particular, the committee resolved to examine and report on:

- (a) Provisions for the extension of the Australian Commission for Law Enforcement Integrity's (ACLEI) jurisdiction including but not limited to:
 - (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;
 - (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;
 - (iii) the administrative and operational practicalities of restricting the Integrity Commissioner's jurisdiction to matters pertaining to an agency's law enforcement function;
 - (iv) the merits or limits of extending jurisdiction to other agencies by means of regulation or legislation; and
 - (v) the expansion of the Integrity Commissioner's anti-corruption education and prevention role to all Commonwealth departments and agencies.
- (b) administrative, policy, legislative and case law developments that may affect ACLEI's practices and/or legislation;
- (c) the adequacy of ACLEI's reporting requirements with respect to performance and to investigation outcomes as set out in the Act and associated regulations;
- (d) the strengths and the limits of the LEIC Act and regulations, and of other arrangements arising from the *Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006*; and

- (e) 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.

- 1.3 The terms of reference were drafted with reference to two main objectives:
- to fulfil legislative requirements that a review of the LEIC Act be undertaken; and
 - to give consideration to the expansion of ACLEI jurisdiction to other Commonwealth bodies with a law enforcement function.

Review of the LEIC Act

- 1.4 Section 223A of the LEIC Act requires that a review of the first three years of the operation of the Act be undertaken.

The possible expansion of ACLEI's jurisdiction

1.5 In February 2009, the committee reported on its inquiry into law enforcement integrity models. The terms of reference for the inquiry required the committee to examine the various Australian state-based law enforcement integrity agencies in order to inform possible changes to the governance structure and operational processes of ACLEI to enhance its current operation and support the potential extension of ACLEI oversight to other Commonwealth agencies with a law enforcement function. Following completion of that inquiry, the committee resolved to turn its attention to the question of ACLEI's jurisdiction.

1.6 ACLEI currently has jurisdiction over the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the former National Crime Authority (NCA). In addition, as a result of the Australian Government's acceptance of a recommendation in the committee's interim report for this inquiry, the Australian Customs and Border Protection Service (Customs) was added to ACLEI's jurisdiction from January 2011. Other Commonwealth agencies are able to be brought under ACLEI's jurisdiction by regulation.

Two-stage reporting process

1.7 On 19 November 2009 the committee agreed to a two-staged reporting process and tabled an interim report in February 2010. The interim report enabled the committee to present findings of a more urgent nature, whilst allowing additional time for the committee to examine broader issues concerning the Commonwealth integrity system.

- 1.8 The interim report focused attention on the following two areas:
- the first part of a staged extension of ACLEI's jurisdiction; specifically, the proposal to bring Customs within the purview of ACLEI; and
 - proposed amendments to the LEIC Act to enhance its operation.

1.9 This report is the final report for the committee's inquiry. It addresses the following matters:

- a further extension to ACLEI's jurisdiction and the basis on which to determine the agencies that should be subject to the oversight of ACLEI;
- additional proposed amendments to the LEIC Act 2006; and
- the Commonwealth integrity framework, including gaps, areas of overlap, and possible measures for improvement.

Conduct of the inquiry

1.10 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website. In addition, the committee wrote to a number of organisations inviting submissions.

1.11 The committee received a total of 24 submissions, 21 of which are published on the committee's website. Three submissions were received as confidential submissions. A list of submissions is contained at Appendix 1.

1.12 In addition, the committee held public hearings in Canberra on 14 August 2009, 23 October 2009 and 4 February 2010, and in Brisbane on 16 October 2009. Following the tabling of the interim report, the committee held further hearings in Canberra on 27 May 2010.

1.13 Following the 2010 Federal Election, the newly appointed committee re-adopted the terms of reference. Further hearings were held in Canberra on 11 February 2011 and 21 March 2011. The witnesses who appeared before the committee are listed in Appendix 2.

Structure of the report

1.14 This chapter provides a brief background to the inquiry.

1.15 Chapter 2 considers ACLEI's proposed 'tiered model for jurisdiction', which operates on the basis that the degree of oversight placed on an agency should be commensurate with the level of corruption risk.

1.16 Chapter 3 gives consideration to ACLEI and its relationship with other agencies in the integrity and accountability sphere. This chapter also discusses the broader Commonwealth integrity system and possible measures for strengthening integrity arrangements at the Commonwealth level.

Acknowledgements

The committee wishes to express its appreciation to all parties who contributed to the conduct of this inquiry, whether by making a written submission, by attending a public hearing or, as in many cases, by making both written and oral submissions.

Chapter 2

Expanding ACLEI's jurisdiction: a risk based approach

Committee findings in the interim report

2.1 This chapter deals with one of the main questions posed in the course of this inquiry: whether the list of agencies under ACLEI's jurisdiction should be expanded. The committee's interim report included significant analysis of this issue, supporting a recommendation, since accepted by the government, that the Australian Customs and Border Protection Service (Customs) be subject to the Integrity Commissioner's oversight.

2.2 The LEIC Act definition of 'law enforcement function' is very broad, with a large number of agencies and departments that could be considered to have a law enforcement function. Indeed, a list of potential agencies provided by the Attorney-General's Department included 12 departments or agencies that were members of the Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA), and 30 that had referred briefs to the Commonwealth Department of Public Prosecutions.¹ Using the 'law enforcement function' criteria could therefore result in a very large and diverse set of agencies becoming subject to ACLEI's jurisdiction.

2.3 In the interim report, tabled in February 2010, the committee instead supported ACLEI's suggested risk-based approach to determining jurisdiction.² This means that those agencies with the highest inherent corruption risk potential should be subject to ACLEI's oversight.

2.4 Such an approach circumvents the difficult task of establishing which Commonwealth agencies have a law enforcement function for the purposes of law enforcement integrity oversight. More importantly, ACLEI's risk management approach enables the application of measures (and resources) that are commensurate with the corruption risk. As ACLEI observed, such an approach to jurisdiction is consistent with the integrity model established by the LEIC Act—that is, 'one that seeks to match measures to risks, with an emphasis on cooperative partnership'.³

2.5 In adopting this approach, the committee recommended that, as an immediate measure, Customs be brought under ACLEI's jurisdiction, due to the high inherent corruption risk associated with the agency's law enforcement functions. This recommendation was accepted by the government, and came into effect in January 2011.

1 Attorney-General's Department, *Submission 12*, Attachment A.

2 See in particular, Chapter 2 of the Interim report.

3 ACLEI, *Submission 14*, p. 13.

2.6 Additionally, the committee considered whether ACLEI should be restricted to only considering corruption issues relating to the law enforcement functions of an agency within its jurisdiction. There was concern by some witnesses that extending ACLEI's attention beyond purely law enforcement issues may dilute the effectiveness of the Integrity Commissioner. However, defining limits could also unnecessarily increase the potential for gaps in oversight provided by ACLEI and other integrity and accountability agencies.

2.7 For these reasons, the committee recommended that the Integrity Commissioner be enabled to investigate any issue relating to alleged, suspected or anticipated corruption or corruption risk in any agency within its jurisdiction. However, the committee also recommended that a statutory requirement be included that ACLEI give priority to matters related to law enforcement functions.

2.8 The section below follows on from the analysis provided in the interim report, with further attention given to corruption risk and ACLEI's proposed three-tiered approach to jurisdiction.

Corruption risk

2.9 ACLEI describes corruption risks as the 'conditions' or 'precursors' that 'may give rise to a corruption issue'.⁴ The law enforcement environment is particularly vulnerable to corruption because of the high corruption risk involved in law enforcement-related activities, for example:

- dealing directly with criminals, such as informers and with organised crime groups;
- discretion over the investigation, charging and arrest of individuals;
- holding or having access to law enforcement data sources; and
- seizing and handling property, firearms and illicit drugs.⁵

2.10 Other corruption risks in the law enforcement environment include:

- misplaced loyalty, due to the strong bonds between law enforcement officers;
- noble cause, where officers break the rules to get the job done at any cost; and
- investigating the investigators, where corrupt officers are skilled in countering standard detection and investigation methods.⁶

4 *Annual Report of the Integrity Commissioner 2008–2009*, p. 61.

5 *Annual Report of the Integrity Commissioner 2008–2009*, p. 65.

6 *Annual Report of the Integrity Commissioner 2008–2009*, p. 65.

2.11 In annexure 2 of their submission, ACLEI provides a comprehensive list of examples of criteria for assessing the need for independent integrity oversight of Commonwealth law enforcement agencies. These criteria address the following five risk areas:

- influence and authority;
- type of work;
- working environment;
- operational risks; and
- organisational environment.⁷

2.12 As noted in the interim report, the committee supports an anti-corruption approach that targets the areas of highest corruption risk, as determined by the above factors. Such an approach is described in ACLEI's submission to the inquiry, where it proposes a tiered model of jurisdiction that matches the level of oversight with the level of corruption risk of a particular agency.

A tiered model for jurisdiction

2.13 ACLEI has proposed the categorisation of agencies into tiers of corruption risk, as a way of determining jurisdiction. This would provide a framework for tailoring anti-corruption oversight measures to the level of corruption risk.

2.14 The model includes three tiers:

- tier one applies to agencies with 'significant law enforcement functions' and 'high inherent corruption risks';
- tier two includes agencies with 'important law enforcement functions and lower inherent corruption vulnerability'; and
- tier three includes all other Commonwealth agencies.⁸

2.15 ACLEI's level and power of engagement with Commonwealth agencies would depend on the tier in which each agency resides.

2.16 Those in tier one would be in a mandatory relationship with ACLEI, identical to that already established under the LEIC Act. That is, the heads of those agencies are compelled by legislation to notify ACLEI of potential corruption issues. ACLEI, in turn, would be required to provide a corruption risk assessment, prevention and awareness-raising assistance. Customs, which has already been brought within ACLEI's jurisdiction, would be classed as a tier one agency.

7 ACLEI, *Submission 14*, Annexure 2, pp 29-31.

8 ACLEI, *Submission 14*, Annexure 2, p. 32.

2.17 The heads of tier two agencies would have the discretion to refer potential corruption issues to the Integrity Commissioner, could seek assistance with corruption risk assessments and would be provided with corruption prevention advice.

2.18 Tier three agencies, which would include all Commonwealth agencies that do not have a high or intermediate level of risk could request corruption prevention advice. This would potentially be provided on either a cost-recovery or fee-for-service basis. These agencies would have no formal or mandatory relationship with ACLEI, nor the ability to refer a corruption issue to ACLEI.

2.19 A table capturing the types of engagement between ACLEI and the three tiers, as proposed by ACLEI, has been reproduced at Appendix 3.

Committee view

2.20 The committee agrees with the three-tier model in principle, as it provides a mechanism by which ACLEI's powers and resources may be appropriately matched to the corruption risk of each agency.

2.21 In practice, the first tier (tier one) already exists, in the form of those agencies already prescribed under the LEIC Act, namely the AFP, ACC, former NCA and Customs. For reasons outlined in the interim report, the nature of the work undertaken by these agencies and the role each plays in disrupting serious and organised crime, naturally makes these agencies targets of value, and hence high risk agencies. While the committee sees the potential for certain other agencies to be subject to tier one oversight, it makes no further recommendation for this to occur at this stage. The committee believes that ACLEI should continue to focus on the agencies already within its jurisdiction.

2.22 However, the committee considers that the establishment of a second tier (tier two) of jurisdiction including other agencies would be desirable, for two reasons. Firstly, it would enable limited corruption oversight of medium-risk agencies, while preserving ACLEI's effectiveness and ability to manage with current resources. The committee believes that it is essential that ACLEI has appropriate resources commensurate with the task it is given. There is a danger present in expanding the number of agencies subject to ACLEI's jurisdiction under the terms currently provided for by the LEIC Act ('tier one' treatment under the proposed model). Overburdening ACLEI would reduce the effectiveness of ACLEI's current activities.

2.23 Secondly, the creation of a second tier would provide a means by which ACLEI can establish a relationship with other agencies with a law enforcement function. In addition to building resistance to corruption in these agencies through education, awareness raising and ongoing communication, ACLEI would develop a greater understanding of the corruption risk profile of tier two agencies. This would provide a growing knowledge-base that could prompt future revision of ACLEI's jurisdiction, including the movement of tier two agencies to tier one oversight.

2.24 For these reasons, the committee supports the amendment of the LEIC Act in order to establish a second tier of agencies subject to limited ACLEI oversight.

2.25 However, the committee notes that under the tiered model described by ACLEI in its submission, the Integrity Commissioner would not be able to commence an investigation or inquiry into a second tier agency on his or her own initiative.⁹ The committee does not support this limitation, and is of the view that the 'own initiative' investigation or inquiry provision should apply to second tier agencies. This would ensure that the Integrity Commissioner can act with independence in the public interest if there is strong suspicion of corrupt conduct in a second tier agency, while recognising that ACLEI's primary focus will remain on tier one agencies.

2.26 In the following section, the committee considers which agencies should initially be subject to second tier oversight.

Recommendation 1

2.27 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to establish a 'second tier' to the Act. Agencies with a law enforcement function included in this second tier would be subject to limited ACLEI oversight, under which the head of an agency, or the minister responsible for the agency, may refer a corruption issue, on a voluntary basis, for consideration by the Integrity Commissioner. The Integrity Commissioner should also have the power to commence an investigation or inquiry into a corruption issue in a second tier agency on his or her own initiative.

Agencies that should be subject to tier two oversight

2.28 Based on the evidence provided during the course of this inquiry, the committee recommends that, at minimum, the Australian Tax Office, CrimTrac, the Australian Transaction Reports and Analysis Centre, the Australian Quarantine and Inspection Service and the Department of Immigration and Citizenship be included in a newly established tier two jurisdiction.

2.29 In making this recommendation, the committee does not allege the existence of widespread or serious corruption in these agencies. Indeed, the evidence provided to the committee suggests that these agencies already take their governance and accountability requirements very seriously. However, the mere potential for corruption in the important law enforcement functions of these agencies suggest the need for, at the very least, limited oversight by and regular communication with ACLEI.

9 ACLEI, *Submission 14*, p. 32.

2.30 In establishing the list of agencies that should initially be prescribed under a second, limited tier, the committee has used the risk criteria developed by ACLEI and outlined in its submission to the committee, noted above (see paragraph 2.11).¹⁰

2.31 Of particular importance to the committee, is the potential for the following agencies to be of value to serious or organised criminal networks. This includes the potential for what ACLEI describes as 'displacement'.¹¹ Displacement refers to a situation where agencies under a high integrity standard, such as the ACC or AFP, already subject to full ACLEI scrutiny, work with agencies of a lower integrity standard. This was described by Mr Nicholas Sellars, ACLEI, who stated:

We would also be looking at agencies that have a close interaction or cooperation with the ACC or AFP, to close off gaps in the integrity system that may arise from displacement—that is, if the Australian Federal Police and the Crime Commission have high standards of integrity and are very resistant to corruption and infiltration, then serious and organised crime may look for softer targets, so there is an interest there as well.¹²

CrimTrac

2.32 CrimTrac is the national broker of policing information and has significant data holdings from Commonwealth, state and territory police agencies. Given the central role of CrimTrac in supporting law enforcement initiatives across Australia, the committee deems it to be appropriate to include the agency in a limited oversight relationship with ACLEI.

2.33 CrimTrac informed the committee that the main corruption risk they had identified was the possibility that serious or organised criminal networks could infiltrate or approach staff members in order to obtain sensitive law enforcement information.¹³ Though this risk is potentially significant, the committee notes the existence of the CrimTrac Audit Log Integration Facility, which continually monitors staff access to CrimTrac data holdings.

2.34 In addition to this monitoring system, the committee was also informed that CrimTrac has robust governance arrangements in place, including accountability, responsibility and reporting mechanisms under section 65 of the *Public Service Act 1999*, an active risk and audit committee and a board of management comprising all of Australia's police commissioners and the Deputy Secretary of the Attorney-General's Department.¹⁴

10 See ACLEI, *Submission 14*, pp 29–31.

11 Mr Nicholas Sellars, ACLEI, *Committee Hansard*, 14 August 2009, p. 4.

12 Mr Nicholas Sellars, ACLEI, *Committee Hansard*, 14 August 2009, p. 4.

13 Ms Theresa Van Gessel, CrimTrac, *Committee Hansard*, 23 October 2009, p. 26.

14 Ms Theresa Van Gessel, CrimTrac, *Committee Hansard*, 23 October 2009, p. 25.

2.35 In addition, the Integrity Commissioner noted that CrimTrac, as a centralised agency with a high degree of internal control of staff, is in a lesser category of corruption risk, relative to larger agencies working across multiple workplaces such as Customs.¹⁵

2.36 CrimTrac has informed the committee that it would support moves to place it within ACLEI's jurisdiction, stating:

CrimTrac believes in conducting its functions and responsibilities in an open and transparent manner and that oversight by ACLEI will provide assurance and certainty to CrimTrac's stakeholders. CrimTrac is also aware of its obligations and responsibilities toward ACLEI should the [LEIC] Act be extended to include it.¹⁶

2.37 Given the value of the information held by CrimTrac to serious and organised criminal networks and the fact that it works closely with Commonwealth, state and territory police agencies, the committee considers that CrimTrac should be subject to a certain level of ACLEI oversight, and hence should initially be included in a second tier arrangement.

Australian Taxation Office

2.38 The Australian Taxation Office (ATO), while not a law enforcement agency, does have a significant law enforcement function and works closely with law enforcement agencies such as the ACC and AFP. Additionally, the ATO's key role in ensuring the payment of taxes naturally entails the transfer of significant amounts of money. For these reasons, the committee considers that the ATO should be subject to at least tier two oversight by ACLEI.

2.39 As Mr Paul Malone, Assistant Commissioner, ATO, explained, the main corruption risk faced by the ATO was the potential infiltration of the office, or influence on people within the office by organised criminal activity.¹⁷ Due to the value of the information held, the ATO is likely to be a target for infiltration, with similar risks identified in tax offices overseas.¹⁸

2.40 In addition to the intrinsic value of the information held by the ATO and its role in collecting revenue for the government, the ATO has a significant law enforcement function, investigating tax fraud and ensuring compliance with taxation legislation. In doing so, it works closely with law enforcement agencies, notably the ACC.¹⁹

15 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 17.

16 CrimTrac, *Submission 5*, p. 2.

17 Mr Paul Malone, ATO, *Committee Hansard*, 23 October 2009, p. 62.

18 Mr Paul Malone, ATO, *Committee Hansard*, 23 October 2009, p. 62.

19 Mr Michael Outram, ACC, *Committee Hansard*, 23 October 2009, p. 48.

2.41 Only a small proportion of ATO staff members are directly involved in the agency's law enforcement function. Of approximately 23 500 staff, 96 are directly engaged in investigating potential tax fraud.²⁰ A number of other tax officers undertake tax audits, and provide support to investigations in joint task forces with law enforcement agencies, such as Project Wickenby, an investigation into serious tax fraud.²¹

2.42 The ATO informed the committee that it has a robust internal fraud control capability and a strong integrity assurance framework. Additionally, the ATO is scrutinised by the Commonwealth Ombudsman and the ANAO, and employs an independent examiner in the form of the Inspector-General of Taxation.²²

2.43 The committee heard that the ATO's current integrity measures compare favourably with counterpart agencies overseas, specifically the United Kingdom and the United States of America.²³

2.44 The committee considers that it would be beneficial to include the ATO in a tier two oversight arrangement, particularly in light of the ATO's involvement in investigations targeting serious and organised crime. However, this raises the question of whether ACLEI's oversight should extend to the whole agency, or simply to its law enforcement functions.

2.45 As indicated above, the law enforcement activity of the ATO is small compared to the total functions of the agency.²⁴ The ATO informed the committee that if the agency was subject to ACLEI's oversight, they would prefer that this be limited to the high-risk law enforcement function of the agency.²⁵

2.46 However, the committee has previously considered that a whole-of agency approach is preferable, as it minimises the possibility that definitional issues may result in gaps or unintended barriers to investigation.²⁶ In the committee's interim report, it recommended that ACLEI be able to investigate any corruption issue or corruption risk in an agency within its jurisdiction, but that this provision include a statutory requirement to give priority to the investigation of matters relating to law enforcement functions.

2.47 The committee considers that ACLEI should also take a whole-of-agency approach to tier two agencies, including the ATO, while prioritising investigation of

20 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 60.

21 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 60.

22 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 64.

23 ATO, answer to question on notice, 23 October 2009 (received 25 October 2009).

24 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 64.

25 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 64.

26 See interim report, p. 12.

corruption risk and issues pertaining to law enforcement functions. Given that referral of corruption issues by the agency head would be voluntary under the tier two arrangement, and that other notifications of corruption issues are restricted to the Minister and staff whistleblowers, the committee believes that a whole of agency approach will be manageable. Furthermore, the committee would not want to restrict ACLEI from investigating a case of serious corruption within the ATO in the event that assistance is sought by the head of the agency or Minister.

AUSTRAC

2.48 The Australian Transaction Reports and Analysis Centre (AUSTRAC) is Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit. As such, AUSTRAC contributes to investigative and law enforcement work to combat financial crime and facilitate prosecution.

2.49 AUSTRAC informed the committee that it does not consider itself to be, nor is it recognised within the Commonwealth as being, a law enforcement agency. It did acknowledge, however, that it could be described as having important law enforcement-related functions.²⁷

2.50 The agency is subject to a number of integrity mechanisms, including the establishment of strong workplace culture, a Fraud and Corruption Control Plan and high level personnel vetting and physical security processes. The financial intelligence system itself is subject to a sophisticated audit trail mechanism. An Internal Auditor provides independent assurance that these controls are operating effectively. An independent Audit Committee is also responsible for reviewing AUSTRAC's risk management, internal control framework, external accountability and legislative compliance.²⁸

2.51 While cognisant of these existing integrity measures, the committee is of the view that AUSTRAC should be subject to limited ACLEI oversight for two main reasons.

2.52 The first is the attractiveness of the agency as a target for organised criminal networks as a result of the agency's role in monitoring and deterring money laundering and other potentially criminal financial activity. In response to a question on notice, AUSTRAC noted that the misuse of its information (including financial data) represents the greatest potential source of risk for corrupt conduct within the organisation.²⁹

2.53 Secondly, AUSTRAC regularly provides information to Commonwealth and state law enforcement agencies. AUSTRAC has Memoranda of Understanding with

27 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

28 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

29 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

the AFP, ACC and Customs facilitating the provision of financial intelligence. Additionally, AUSTRAC Senior Liaison Officers are out-posted to the AFP, ACC and Customs to provide training and analytical support to those agencies' operations.³⁰ As a result, the committee considers that there is a possible risk of 'displacement' where AUSTRAC may be targeted for infiltration in lieu of other law enforcement agencies already subject to ACLEI oversight.

Department of Immigration and Citizenship

2.54 Together with the ATO and Customs, the Department of Immigration and Citizenship (DIAC) is one of three agencies identified as being of high corruption risk by ACLEI.³¹

2.55 Ms Alison Larkins, First Assistant Secretary, DIAC, explained that the department's law enforcement functions fall into two broad categories, stating:

There are two groups of law enforcement functions; those that operate at the border and those that operate within Australia. I run the law enforcement functions that relate to onshore compliance. Officers in our network have the power to detain citizens and we also have investigative powers.³²

2.56 However, Ms Larkins noted that the main corruption risk within DIAC is likely to be in the granting of visas rather than law enforcement functions.³³

Looking at our work and using ACLEI...criteria for where risk lies, the work that is done in the compliance area and the decision to detain is now extremely well controlled both internally and externally. It is also a group activity so there is very little decision making that is not done with a lot of exposure. Also there are not a lot of benefits in that space. On release from detention you are usually released on a temporary visa for a short period. It is in the visa space and the citizenship space where there are significant benefits that you might get from within our department.³⁴

2.57 DIAC reported that there have been two substantiated cases of an official granting or expediting a visa in return for sexual favours or money in the last two or three years.³⁵ DIAC officials noted that the ability to request specialised assistance from ACLEI would be welcome and useful in some circumstances.³⁶

30 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

31 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 6.

32 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 70.

33 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 70.

34 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 71.

35 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 72.

36 Mr Benjamin Noyen, DIAC, *Committee Hansard*, 23 October 2009, p. 76.

2.58 The committee notes that a similar issue emerges as was discussed in the context of the ATO. Namely, enabling ACLEI to investigate potentially corrupt behaviour in areas of an agency that do not technically have a law enforcement function may dilute the focus of the Integrity Commissioner. As noted by the Integrity Commissioner, such an approach may lead to the introduction of a Commonwealth-wide integrity agency 'by stealth'.³⁷

2.59 Nevertheless, the committee considers that, while the LEIC Act should include a statutory requirement to prioritise the investigation of corruption issues relating to law enforcement, this should not prevent the investigation of serious non-law enforcement corruption issues where deemed appropriate by the head of the agency concerned.

Australian Quarantine and Inspection Service

2.60 The Department of Agriculture, Fisheries and Forestry (DAFF), through the Australian Quarantine and Inspection Service (AQIS), is responsible for managing quarantine controls at Australia's borders to minimise the risk of exotic pests and diseases entering the country. AQIS also provides import and export inspection and certification in relation to biosecurity. In 2010–11, AQIS staff represented approximately 3400 of DAFF's 5000 staff.³⁸

2.61 DAFF informed the committee that AQIS law enforcement functions are limited to the Investigations and Enforcement Program, which investigates alleged client breaches of AQIS legislation. DAFF noted that due to the relatively limited powers of investigators, the nature of the activities subject to investigation and the existence of supervisory review and monitoring, the potential for corruption is limited. DAFF informed the committee that there have been no matters of corruption relating to law enforcement activities undertaken within AQIS in the past 18 years.³⁹

2.62 The committee notes that AQIS also plays a key role in protecting Australia's border, specifically in relation to biosecurity. For example, AQIS officers are responsible for checking mail, screening passengers and inspecting containers for biosecurity risks.⁴⁰ Officers of the Investigations and Enforcement Program have developed an effective working relationship with Customs, working together on operations on a small number of occasions.⁴¹

37 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 11.

38 DAFF, answer to question on notice, 9 May 2011 (received 24 May 2011).

39 DAFF, answer to question on notice, 9 May 2011 (received 24 May 2011).

40 DAFF, Annual report 2009–10, p. 116.

41 DAFF, answer to question on notice, 9 May 2011 (received 24 May 2011).

2.63 As a result, the committee is of the opinion that AQIS should also be subject to limited ACLEI oversight due to the proximity of AQIS inspectors to Customs activities and border security measures.

Recommendation 2

2.64 The committee recommends that ACLEI's second tier jurisdiction should initially comprise the Australian Taxation Office, the Australian Transaction Reports and Analysis Centre, CrimTrac, the Australian Quarantine and Inspection Service and the Department of Immigration and Citizenship.

2.65 The committee notes that some of the arguments it has used to justify the inclusion of certain agencies in a second tier of limited ACLEI jurisdiction could potentially be extended to cover other agencies in the Heads of Commonwealth Operational Law Enforcement Agencies group, or agencies that provide briefs to the Commonwealth Director of Public Prosecutions.

2.66 Additionally, it is possible that, in establishing a relationship with the named tier two agencies above, ACLEI may be provided with information that suggests that one or more of those agencies should be moved from tier two to tier one (i.e. full oversight under the terms of the current LEIC Act).

2.67 For this reason, the committee recommends that, if established, the operation of a second tier of jurisdiction, and the list of agencies therein, be reviewed after a period of two years from the date the amendment comes into force.

Recommendation 3

2.68 The committee recommends that the operation of a second tier in the *Law Enforcement Integrity Commissioner Act 2006* and the list of agencies prescribed in that tier be reviewed two years after initial establishment. This review should include consideration of whether any tier two agencies may more appropriately be subject to tier one prescription. Similar reviews should subsequently be conducted at two year intervals.

Tier three: corruption prevention assistance

2.69 As noted above, ACLEI's proposed model includes a third tier jurisdiction that includes all Commonwealth public sector agencies not considered to have an intermediate to high law enforcement corruption risk (and therefore not in tier one or tier two). These agencies would have no formal or mandatory relationship with ACLEI. Nor would agency heads have discretion to refer a corruption issue to ACLEI, even in a voluntary capacity. Tier three agencies may however request corruption prevention advice and awareness raising about corruption risks.

2.70 The committee agrees that ACLEI should have some involvement in the provision of corruption prevention advice and education about corruption risks to the broader public service. However, the committee does not consider that amendment of the LEIC Act to establish a third tier of jurisdiction is required to achieve this. Instead,

the committee explores a possible role for ACLEI in this regard in the next chapter, which deals with the broader Commonwealth integrity regime.

Prescribed agencies: by legislation or regulation?

2.71 ACLEI presently has jurisdiction over agencies prescribed within section 5 of the LEIC Act; that is, the ACC, the AFP and the former NCA. In addition, Customs is currently prescribed by regulation.⁴²

2.72 The committee received limited evidence on the question of whether ACLEI's jurisdiction should be extended to other agencies by regulation or legislation.

2.73 ACLEI expressed its support for existing arrangements to continue noting that they provide flexibility for the government and for ACLEI. ACLEI further claimed that there are sufficient mechanisms in place to protect the integrity of these arrangements.⁴³

2.74 The Attorney-General's Department commented on the benefits of existing arrangements:

Extension by regulation is a simpler, faster and more flexible way of extending jurisdiction than amending the LEIC Act itself. Parliamentary oversight is still exercised through the tabling and disallowance process.⁴⁴

2.75 Alternatively, Transparency International Australia submitted that the extension of ACLEI's jurisdiction should occur by 'legislative overhaul' and 'not by regulation'.⁴⁵

2.76 Professor AJ Brown and Mr Peter Roberts similarly argued that the extension of ACLEI's jurisdiction should be by legislation and not by regulation. They wrote:

A key part of the avowed purpose of having integrity agencies such as ACLEI is their institutional independence both from the agencies under scrutiny, and from political interference or instruction by the Government of the day. In practice, such an agency may cooperate closely both with agencies and with Government, but their ability to be seen to be independent when it counts is a crucial part of their legitimacy and *raison d'etre*.

In our view it remains undesirable that the Government should have the power to extend jurisdiction by regulation, as this suggests or acknowledges a degree of *ad hocery* in what the Government and Parliament consider to

42 Law Enforcement Integrity Commissioner Regulations 2006, s. 6; please note that the Crimes Legislation Amendment Bill (No. 2) 2011, currently before the Australian Parliament, would, if passed, prescribe Customs by amending the LEIC Act instead.

43 ACLEI, *Submission 14*, p. 12.

44 Attorney General's Department, *Submission 12*, p. 3.

45 Transparency International Australia, *Submission 13*, p. 4.

be the purpose of the agency. Flexibility is one thing, but ad hocery is undesirable.⁴⁶

2.77 Professor Brown qualified this view:

I do not see it as being a crucial issue provided, of course, that the foundational jurisdiction of ACLEI is extended to reflect its current core mission as being a law enforcement integrity agency body by including all of the relevant agencies that it should have within its jurisdiction.⁴⁷

2.78 The committee appreciates the point that an agency such as ACLEI should have 'a clear, legislated jurisdiction which everyone understands, and which does not change on the whim of the Executive'.⁴⁸ At the same time, the committee considers it critical that Government is able to be responsive to changing corruption risks particularly in an environment where rapidly evolving technologies open the law enforcement environment to new and changing corruption risks.

2.79 For this reason, while the committee encourages the government to establish ACLEI's jurisdiction through legislative amendment, the capacity to add agencies by regulation should be retained. This will enable the circumvention of delays potentially associated with legislative amendments.

Other amendments to the operation of the LEIC Act

2.80 In the committee's interim report, it made a number of recommendations regarding specific amendments to the LEIC Act. The committee looks forward to the Government's response to those recommendations. In addition to those recommendations, the committee also proposes the following two amendments to the LEIC Act.

Confidentiality provisions

2.81 ACLEI raised a further possible amendment to the LEIC Act during its appearance before the committee at a public hearing on 11 February 2011. Law enforcement agencies, including Customs, are subject to various secrecy and confidentiality provisions in legislation. Though this has not been a problem for ACLEI so far, the Integrity Commissioner informed the committee that it would be desirable to ensure that such secrecy and confidentiality provisions not interfere with ACLEI's ability to question staff in any of those agencies.

In our view the Customs Administration Act presents no problem but it would be convenient if the issue were put beyond doubt.

It also would apply in another context whereby there may be, say, a taskforce which involves some of the law enforcement agencies for which

46 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, p. 4.

47 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 3.

48 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, p. 4.

ACLEI is responsible, say Customs and the AFP, but other agencies' staff might also be in that taskforce. They in that context may observe a corruption issue which they would want to refer to the Integrity Commissioner but they may be barred from doing that by secrecy or confidentiality provisions of their legislation.⁴⁹

2.82 If secrecy and confidentiality provisions were able to override the investigatory powers of the Integrity Commissioner, the ability to uncover corruption would be significantly undermined. In particular, the committee notes that such a situation could act to undermine the public perception of integrity in law enforcement agencies. For this reason, the committee supports the Integrity Commissioner's suggested amendment.

Recommendation 4

2.83 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to ensure that secrecy and confidentiality provisions pertaining to law enforcement agencies within ACLEI's jurisdiction do not prevent the Integrity Commissioner from receiving information necessary to the investigation of a corruption issue.

Appointment of the Integrity Commissioner

2.84 The committee notes that under the current provisions of the LEIC Act, an individual cannot be appointed to the position of Law Enforcement Integrity Commissioner for a period greater than five years. The committee considers that this does not provide sufficient flexibility for a situation where ACLEI is undergoing extensive change, or where there is an ongoing, serious investigation. The committee is of the view that such situations could warrant the extension of the Integrity Commissioner's appointment for a further maximum period of two years.

2.85 The committee therefore proposes an amendment to the LEIC Act to enable such an extension to take place. In order to ensure the appropriate oversight of such a provision, the committee recommends that the extension of the appointment of an Integrity Commissioner for a further two years would require the consent of both the Minister and the committee.

49 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, pp 16–17.

Recommendation 5

2.86 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so that the period of appointment of the Integrity Commissioner may be extended once, beyond the five year period of appointment, for a period of up to two years by the Governor-General on recommendation of the Minister, with the approval of the committee. Any such extension to the period of appointment should apply only to a serving Integrity Commissioner and should be approved no less than three months before the expiry of the current period of appointment.

Chapter 3

The ACLEI model and the broader integrity system

3.1 This chapter examines the current approach to integrity assurance across the public service, with a focus on how ACLEI does and could relate to the broader integrity system.

3.2 It commences with a summary of evidence relating to definitions of corruption, particularly in the context of the LEIC Act, before moving to an examination of the approach taken to integrity assurance across the public service, including the potential for a more focused corruption fighting approach. Though not explicitly within the inquiry's terms of reference, due to the amount of evidence presented by witnesses and submitters, the case for a Commonwealth-wide anti-corruption commission is considered.

3.3 The committee makes a number of recommendations that would enhance overall Commonwealth public sector integrity, through further definition of ACLEI's relationship with other agencies with an integrity and accountability function.

What is corruption?

3.4 While at superficial level there is a common understanding of what corruption means, it is a concept that continues to be contested and explored by anti-corruption practitioners. There is no internationally agreed definition of corruption; nor is there consensus about the range of activities that are seen to constitute corrupt conduct. Professor AJ Brown notes that in spite of an 'unprecedented demand for a single, universal understanding of the idea of corruption, capable of spanning international, cultural and religious borders', no such objective has been achieved.¹

3.5 Transparency International provides a broad definition of corruption as 'the abuse of entrusted power for private gain'.² This characterization reflects a trend to 'strip the definition of corruption back' leaving open to 'legislators, law reformers and social agents' the task of articulating a more specific definition of corruption and corrupt behaviour that is tailored to the particular political, economic and cultural context in which the definition is formulated.³

1 Professor AJ Brown, 'What are we trying to measure? Reviewing the Basis of Corruption Definition', in Charles Sampford, Arthur Shacklock, Carmel Connors and Fredrik Galtung (eds.), *Measuring Corruption*, Ashgate Publishing Ltd, 2006, p. 57.

2 Transparency International, www.transparency.org/news_room/faq/corruption_faq (accessed 29 June 2010).

3 Professor AJ Brown, 'What are we trying to measure? Reviewing the Basis of Corruption Definition', in Charles Sampford, Arthur Shacklock, Carmel Connors and Fredrik Galtung (eds.), *Measuring Corruption*, Ashgate Publishing Ltd, 2006, p. 59.

Corruption within the law enforcement context

3.6 ACLEI has observed that within the law enforcement context 'corruption involves improper actions or abuse of power and trust by an official'.⁴ Extending this understanding ACLEI stated:

[Corruption] entails conduct that undermines or misuses the legitimate functions of a law enforcement agency, or of a position within an agency, for criminal, political or personal purposes.⁵

3.7 Section 6 of the LEIC Act provides a definition of corrupt conduct (although not of corruption per se) as follows:

- a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
- b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
- c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.⁶

3.8 Comprehensive examples of behaviour that may constitute corruption within the law enforcement context are listed at Appendix 4. This includes conduct that:

- illegitimately seeks to gain profit or benefit for self or others;
- uses proper powers and discretions for an improper purpose;
- uses law enforcement functions to support or assist criminal activity;
- misuses information to support or assist criminal activity;
- sabotages the impartial detection, investigation and prosecution of crimes;
- may assist infiltration of an agency by criminal or corrupt groups;
- places at risk the impartial function of an agency; or
- facilitates corruption.⁷

3.9 According to ACLEI, the legal definition of corrupt conduct within the LEIC Act is deliberately broad in order to accommodate the evolving nature of the concept of corruption and corrupt activity. As ACLEI submitted:

‘Corruption’ is a nebulous term, and is frequently misunderstood and misapplied. Defining the term often seems to be counter-productive.

4 *Annual Report of the Integrity Commissioner 2008–2009*, p. 68.

5 *Annual Report of the Integrity Commissioner 2008–2009*, p. 68.

6 *Law Enforcement Integrity Commissioner Act 2006*, s. 6.

7 *Annual Report of the Integrity Commissioner 2008–2009*, pp 69–71.

ACLEI uses a descriptive approach to give the term meaning in the LEIC Act context...

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...

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.⁸

3.10 However, Mr Howard Whitton, Fellow, ANZSOG Institute for Governance, was critical of the current broad definition on the grounds that it may not be easily understood without legal advice. This lack of specificity could mean that non-experts may not approach the Integrity Commissioner or ACLEI with information.⁹ Appearing before the committee in March 2011, Mr Whitton argued:

[T]he definition of corruption in the LEIC act is very vague. In fact, corruption itself is not defined. Corrupt conduct is defined in terms of abuse of office. There are difficulties with that, in that most public servants these days, certainly in the Commonwealth, do not occupy an office.

Further, there is the difficulty when it comes to explaining to the public at large, either in terms of explaining ACLEI's jurisdiction or in a training program, for example, what corruption is.¹⁰

3.11 Mr Whitton instead favoured the more specific language used to describe corruption in the *Independent Commission Against Corruption Act 1988* (NSW). This definition, reproduced at Appendix 5, includes 25 matters that may comprise corrupt conduct. Corrupt conduct itself is defined as:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the

8 ACLEI, *Submission 14*, p. 25.

9 Mr Howard Whitton, *Submission 24*, p. 8.

10 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p. 13.

course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.¹¹

3.12 Mr Whitton contended that the specification of categories of corrupt conduct is more useable and, in particular, encourages whistleblowing as intending whistleblowers can be more certain about whether their actions are protected by the legislation.¹²

3.13 However, Professor John McMillan, while in favour of further development of the definition of corruption, contended that the New South Wales definition was perhaps overly prescriptive:

The ICAC Act has a definition of corruption and there are similar definitions in the legislation establishing the counterpart Western Australian and Queensland bodies. There is a deal in common in those and with the United Nations and other definitions, such as breach of trust, perversion of the course of justice, bribery and the like, but there are other areas of difference...[I]t seemed to me that the definition of corruption in the New South Wales ICAC Act went further than the ACLEI Act, and further than I think it should go as well. Again, it bolsters that need for Commonwealth purposes to define what we mean as corruption in that context.¹³

3.14 The Public Service Commissioner, Mr Stephen Sedgwick, responding to arguments for an extension of ACLEI's jurisdiction, noted that the broad definition of corruption encompassed a range of behaviour that they did not perceive to be corruption:

On the evidence that is available to us, it just does not seem that there is a case for extending the purview of ACLEI, particularly in circumstances where corruption is such an ill-defined term. You can see that in some of the material that has been presented to you. You have been given information that includes as corruption stuff that we just regard as being poor practice and bad management, and it needs to be dealt with in that way.¹⁴

3.15 The Commonwealth Ombudsman, Mr Allan Asher commented that there were already definitions of matters such as fraud, misuse of information and improper disclosures. Mr Asher did not see the need for a more specific definition of corruption, stating:

What you are looking at instead is a range of behaviours and outcomes which are unacceptable and unwanted. For example, in our own area we often speak about administrative deficiency. We do not find a need to have

11 *Independent Commission Against Corruption Act 1988*, s 7–9; reproduced in *Submission 24*, pp 9–12.

12 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p. 13.

13 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 5.

14 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 8.

a clear legal definition of that. Instead, we just describe administrative action that fails to reach its objective, is unfair or unjust or sometimes unlawful.¹⁵

Delineating corruption issues

3.16 The definition of corruption and what constitutes corrupt conduct is also important for government agencies both involved in and subject to integrity oversight. A vague definition can complicate both compliance with integrity measures and jurisdictional delineation between integrity agencies. For example, the AFP submitted that the current broad definition of corrupt conduct:

creates an element of uncertainty in relation to matters that the AFP is obliged to refer to the Integrity Commissioner.¹⁶

3.17 Commander Mark Walters from the AFP outlined the context within which this submission was made:

[W]here there has been a bit of, shall we say, tension is a view around what should be notified to the Integrity Commissioner in terms of conduct and what might fall within that broader definition of corruption. Some things are quite clear and fall within the definition of engaging in corrupt conduct. But there is other conduct that we have referred to us in Professional Standards, that probably falls into a grey area, and there would be some interpretation around whether it is in fact conduct that would require notification to the Integrity Commissioner or it would be investigated by AFP Professional Standards.¹⁷

3.18 Commander Walters noted that there would be advantages and disadvantages in tightening up the definition in the LEIC Act and stated that the development of a 'framework' for interpretation agreed between all parties would be the best course of action:

[I]f we can in a collegiate way come up with a framework that allows us to give interpretation to corruption and what should be notified, that is probably the best outcome for the current situation.¹⁸

3.19 The ACC noted the benefit of the flexibility inherent in the current broad definition, commenting:

We have a view that the way the act is currently constructed allows us to make well judged decisions about what to refer there without being overly prescriptive. We are working with ACLEI and there is some work going on around definitional matters and how you would do that. I think that everyone agrees that it is important not to be too prescriptive because the

15 Mr Alan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 8.

16 AFP, *Submission 10*, p. 2.

17 Commander Mark Walters, AFP, *Committee Hansard*, 23 October 2009, p. 14.

18 Commander Mark Walters, AFP, *Committee Hansard*, 23 October 2009, p. 15.

exposure we have had so far suggests that there is no pattern, general theme or trend. Things tend to emerge quite differently each time. It is a balance between what the right definition is and what is overly prescriptive, so that some stuff will not be missed out. It is a very delicate issue, but one that we all focus on. Personally, I am inclined towards a broader interpretation from the agency's referring perspective...¹⁹

3.20 The Commonwealth Ombudsman's Office reported in 2009 that it had liaised with ACLEI to develop an agreed definition of corruption but, at that time, a shared definition had not yet been achieved. The Ombudsman's office explained that:

Defining what falls within the term would help to delineate the jurisdictional boundaries between the ACLEI, the AFP, the ACC and the Ombudsman, and to define the duty of the AFP and ACC to notify the ACLEI of corruption issues.²⁰

3.21 Reflecting on his former role as the Commonwealth and Law Enforcement Ombudsman, Professor McMillan informed the committee that:

I see it as important to expand on the rather open-ended definition of corruption issues given in the legislation. That definition is important for delineating the responsibilities of different agencies.²¹

3.22 Professor McMillan recommended that the agencies concerned, including ACLEI, the Commonwealth Ombudsman, the AFP and the ACC should be tasked with developing a draft definition or draft policy on corruption, with which they could then consult with the Australian Parliament.²²

Committee view

3.23 The committee notes the arguments above both for and against the development of a more specific definition of corruption. While understanding that a broad definition allows for flexibility, the committee is of the opinion that a more detailed and comprehensive definition of corruption is required. The committee considers that further definition of the term would provide greater clarity to the anti-corruption work conducted by ACLEI, while serving to more effectively delineate corruption issues from issues better handled by other agencies.

3.24 The committee considers that as ACLEI has now been in existence for four years, its understanding of corruption in the context of law enforcement has developed to a point that allows further definition of the term.

19 Ms Jane Bailey, ACC, *Committee Hansard*, 23 October 2009, p. 50.

20 Commonwealth Ombudsman's Office, answer to question on notice, 14 August 2009 (received 8 September 2009), p. 1.

21 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 2.

22 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 3.

3.25 The committee commends the work undertaken to-date by the various agencies involved to better clarify the behaviours and actions that constitute corrupt conduct. However, the committee would like to see this work concluded, in the form of a more detailed and comprehensive agreed definition of corruption.

3.26 For this reason, the committee recommends that the Integrity Commissioner, the Commonwealth Ombudsman, the Public Service Commissioner, the Auditor-General and the Attorney-General's Department collaborate to develop a more detailed and comprehensive definition of corruption for the purposes of the LEIC Act. The ICAC definition together with ACLEI's examples of corrupt conduct as set out in paragraph 3.8 above and Appendix 4 below, would be a suggested starting point. A draft paper outlining a proposed new definition of corruption should be publicly released for consultation no later than November 2011 to allow for the amendment of the definition in the LEIC Act by June 2012. The consultation should include this committee.

Recommendation 6

3.27 The committee recommends that the Integrity Commissioner, the Commonwealth Ombudsman, the Public Service Commissioner, the Auditor-General and the Attorney-General's Department develop a more detailed and comprehensive definition of corruption for the purposes of the *Law Enforcement Integrity Commissioner Act 2006*. A proposed definition should be circulated for public consultation, including this committee, no later than November 2011.

3.28 Establishing and implementing a sufficiently detailed corruption definition would also provide a stronger basis for the reporting and measurement of corruption issues. An appropriate definition may have applicability to the broader Commonwealth integrity system discussed below.

Approaches to integrity assurance

3.29 Mr Howard Whitton reported to the committee that there is a diversity of ways in which corruption is approached internationally, which could inform Australia's approach. However, as he explained:

We tend to adopt uncritically the conceptualisation favoured under the influence of the World Bank and the OECD in the Western world, which is characterised by a disease model in which corruption is regarded as akin to a mass infection of some kind for which one day some magic cure will be discovered by a scientist and all will be well. This abstraction can have rhetorical value, but it seriously misleads thinking about policy responses to corruption as it really is. Further, the immunisation model is seriously flawed. The immunisation model states broadly, as we have heard, that you make some changes in the system at the top of the culture and you let the culture grow with this magical resistance to corrupt conduct within its structures: it does not happen.

By contrast, in 2009 UN Secretary-General Ban Ki-moon warned specifically against the disease model. He said:

'... corruption is not some vast impersonal force. It is the result of personal decisions, most often motivated by greed.'

The alternative conception for thinking about corruption might be called the 'termite infestation' model, in which corruption is regarded as opportunistic, individualised, active and deliberately covert. When well-resourced and organised, corrupt conduct by individual officials can feed organised crime, defeat the rule of law, support state capture, create porous national borders, undermine markets and the provision of state services, compromise the integrity of public institutions, support trafficking and terrorism, sustain money laundering and encourage clientelistic networks of patronage and mutual obligation for mutual benefit in a self-enforcing system. This is the model, I suggest, that we need to take seriously and to think about when we talk in terms of ACLEI and its possible role in preventing and detecting corruption in Australia.²³

3.30 For this reason, Mr Whitton advocated the development of effective detection and prevention systems, sanctions, targeted pro-integrity policies and practices and institutional incentives that contribute to a corruption-resistant ethos at the institutional level.²⁴

3.31 The Commonwealth Ombudsman informed the committee that integrity systems could adopt one of three models. A common one was a law enforcement approach that received allegations and investigated accordingly.²⁵ This reactive model is represented in several state anti-corruption bodies.²⁶

3.32 A second model involved a focus on prevention and education. This model emphasises the development of internal governance in order to mitigate potential weaknesses.²⁷

3.33 A third possible model was a hybrid of the first two. As the Commonwealth Ombudsman saw it, ACLEI itself represented the hybrid approach, stating:

ACLEI...tends to describe itself as a law enforcement agency, which would be closer to [the first model], although it does have some other roles as well. The initial conception some years ago would have had it more at that second level. Perhaps if we were to look at it now we would say that it is closer to the third but sees itself more as the first.²⁸

23 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p 10.

24 Mr Howard Whitton, *Submission 24*, p. 6.

25 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 2.

26 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 4; the committee notes that, in its previous inquiry into law enforcement integrity models, it found that several state anti-corruption agencies do include education and prevention as aspects of their work. See *Inquiry into Law Enforcement Integrity Models*, February 2009, pp 31–38.

27 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 2.

28 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 6.

3.34 The committee notes the importance of supplementing an investigative capacity that can deal with allegations of corruption with a prevention model that strengthens governance and reduces corruption incentives. As Mr Whitton described it, 'good people, without good institutions, will not succeed; and good institutions, without good people, will fail.'²⁹

3.35 With this in mind, the committee reiterates its support for a risk-based approach to integrity, noting that wherever incentives for corrupt behaviour exist, so too will that risk. The committee prefers an integrity approach that assumes the existence of corruption and acts accordingly.

The importance of enhanced corruption detection

3.36 The committee accepts statements by both the Public Service Commissioner and the Law Enforcement Integrity Commissioner that there is no evidence of serious or systemic corruption in the Australian Public Service (APS). For instance, the Public Service Commissioner stated:

There are only a small number of corruption cases reported annually across the Australian Public Service and there is no evidence that corruption within the meaning of the LEIC Act—that is to say, bribery or perverting the course of justice—is a significant issue in the APS.³⁰

3.37 The Integrity Commissioner agreed with this assessment, stating:

The question is: is there corrupt conduct that is going unaddressed? I think the evidence of the Public Service Commissioner is correct. We have instances, but we do not have across-the-board, systemic serious issues in the Public Service, in the same way that the perception was for the agencies under ACLEI's jurisdiction, the initial ones anyway, and my experience subsequently.³¹

3.38 The Integrity Commissioner also noted however, that the reality of what ACLEI had found since its establishment did not accord with expectations prior to establishment. Rather than a few, serious issues, the experience of ACLEI had instead been the notification and referral of many, less serious issues. As the Integrity Commissioner explained:

There was initial expectation in ACLEI's workload that it would not be great. Indeed, the thought was that there might be three or four investigations per year that ACLEI would be engaged in. In fact, it has turned out to be quite the contrary. The number of corruption issues received and investigations made is significant and the numbers far exceeded the expectation. Such investigations that ACLEI undertakes are

29 Mr Howard Whitton, *Submission 24*, p. 7.

30 Mr Stephen Sedgwick, Public Service Commissioner, *Committee Hansard*, 11 February 2011, p. 2.

31 Mr Philip Moss, Integrity Commissioner, *Committee Hansard*, 11 February 2011, p. 19.

mostly complex and difficult, but they would be described as being of middle order and not of royal commission significance. They are hard targets nevertheless. So here was ACLEI being established with the thought that it would be a standing royal commission dealing with a few very, very serious measures, and that has not proved to be the case. In other words, the reference to the perception that the bodies currently did not have a significant problem with corruption has been found to be correct in our experience.³²

3.39 As discussed in the committee's inquiry into law enforcement integrity models, a distinction exists between complaint handling bodies and anti-corruption bodies. The primary purpose of (public sector) complaint handling bodies is to investigate and address complaints reported by individual citizens who believe they have been treated unfairly, unreasonably or improperly by a government department or agency. This is the principal role of the Commonwealth Ombudsman.³³

3.40 Law enforcement and public sector anti-corruption or integrity agencies increasingly focus on serious misconduct and corruption. Through corruption detection and investigation they endeavour to expose the truth in order to curb and prevent corruption. Through risk analysis, research and education they aim to raise standards of integrity.³⁴ ACLEI fits into this second category.

3.41 As noted by Professor John McMillan, former acting Integrity Commissioner and former Commonwealth Ombudsman, these two types of agencies require a different 'skill set'.³⁵ Further, the primary focus of a complaint-handling body is the complainant. The information and lessons learnt from a complaint are important but secondary. The focus of an anti-corruption agency is the quality of the information or intelligence and its contribution, ultimately, to preventing corruption. In this scenario the informant is important but secondary. The capacity to detect potential corruption is paramount.

3.42 Mr Howard Whitton was critical of the current ability to detect corruption in the broader public service and questioned the reliance on existing statistics that suggested little to no systemic corruption:

At the national level there is still no single Commonwealth institution with a responsibility for detection and prevention of corruption other than crime

32 Mr Philip Moss, Integrity Commissioner, *Committee Hansard*, 11 February 2011, p. 14.

33 See for example, www.comb.gov.au/commonwealth/publish.nsf/Content/aboutus_role. It should be noted that while processing complaints is the core role of the Ombudsman a range of other work is undertaken, for example, conducting own-motion investigations into administrative matters, undertaking research and conducting compliance audits.

34 For a useful summary of the differences between a complaint-handling body and an anti-corruption body see ACLEI, *Annual Report of the Integrity Commissioner 2006–07*, p. 18.

35 Prof John McMillan, *Committee Hansard*, 27 May 2010, p. 5.

in the terms envisaged by the UN Convention against Corruption, which Australia has ratified but as yet has not...complied with.³⁶

3.43 This point was echoed by Professor Tim Smith, Chair of the Accountability Round Table, who noted the following:

It seems to me you come to the point where you say, human nature being what it is, there will always be a corruption problem in government. It will surface from time to time, but there will always be a problem. The conclusion I came to was that what you are looking at is a risk management problem. I was interested to hear the head of ACLEI talking about their approach, which is a risk management approach. I think that is the only way you can approach it. It is unrealistic to suggest that the test of whether you do anything is whether there is corruption, because it is going on while we speak and we do not know about it. That is the harsh reality.³⁷

3.44 The committee is therefore of the opinion that, while there is little evidence to suggest any systemic corruption in the Australian Public Service, this should not preclude the existence of an integrity system that is proactive in defending integrity, with enhanced detection methods that do not rely on accidental or incidental discovery of corrupt behaviour. As noted by the Commonwealth Ombudsman, Mr Allan Asher:

[W]hile ever there is such a large range of Commonwealth programs, and programs where the Commonwealth is directly funding activities, there are incentives around for corruption, and corruption really results from incentive plus opportunity. Those incentives and opportunities are clearly increasing quite considerably.³⁸

3.45 In the next section, the committee examines the current integrity arrangements covering the Australian Public Service, with a view to suggesting improvements to the system's ability to be proactive in discovering corruption. Paramount in this endeavour is building better links between that system and ACLEI.

The Commonwealth integrity system

3.46 As discussed by a number of witnesses, the Commonwealth integrity system is based on a multi-agency model, in which a number of agencies play a different role in encouraging and policing integrity in the Commonwealth public sector.³⁹ The committee notes that whilst each of the agencies involved play an important role in promoting integrity and countering misconduct, corruption and maladministration, this multi-agency 'model' is largely a product of history and not of design.

36 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p. 11.

37 Professor Tim Smith, Accountability Round Table, *Committee Hansard*, 11 February 2011, p. 44.

38 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, pp 1–2.

39 See for example, Attorney-General's Department, *Submission 12*, p. 2.

The current multi-agency approach

3.47 The current Commonwealth integrity framework could be considered to be led by a number of agencies, including at minimum the Australian Public Service Commission (APSC), the Commonwealth Ombudsman, the Australian National Audit Office (ANAO) and ACLEI.

APS values and the Code of Conduct

3.48 The APSC informed the committee that the main integrity framework governing the conduct of Australian Public Service employees involved an ethical construct using the APS Values and the Code of Conduct. As the Merit Protection Commissioner, Ms Annwyn Godwin explained:

This framework, which is set out in the APS Values and Code of Conduct, comprises a number of elements which require APS employees to avoid actions which are, or could be perceived to be, corrupt. The values and the code require APS employees, for example, to behave honestly and with integrity, make proper use of Commonwealth resources and comply with all applicable Australian laws. These elements are quite clear in their intent as they are legislatively based, legally binding, nondiscretionary and can lead to real penalties if not properly observed. The penalties can range from a reprimand, a reduction in salary through to reduction in classification or, ultimately, termination of employment.⁴⁰

3.49 The elements of the Code of Conduct most relevant to corruption, include the obligations to:

- behave honestly and with integrity in the course of APS employment;
- when acting in the course of APS employment, comply with all applicable Australian laws;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment;
- use Commonwealth resources in a proper manner;
- not make improper use of:
 - (a) inside information, or
 - (b) the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.⁴¹

40 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 20.

41 APSC, *Submission 2*, p. 2.

3.50 The APSC conducts extensive training within Australian Public Service agencies, promoting an ethical culture through observance of the APS Values and Code of Conduct. As Ms Karin Fisher, APSC, observed:

We do have a wealth of education tools. We have an ethics website; there are some educational materials there. We also work very closely with the other parts of the Public Service Commission responsible for coordinating service-wide training and development, and we have public programs on ethics—or, if agencies would like something more tailored, we have a panel of consultants that we go to and use for tailored programs, as well as having some education materials that agencies can take and use and adapt themselves. But that is a broad education role in terms of ethics generally, particularly in relation to the APS Values and Code of Conduct, rather than corruption specifically.⁴²

3.51 The committee naturally supports the promotion of the APS Values and the Code of Conduct and accepts the cultural approach to encouraging ethical behaviour. However, the committee is not convinced that the promotion of the APS Code of Conduct by the APSC of itself effectively addresses corruption risk for the following reasons.

3.52 The committee notes that the Code of Conduct only applies to a portion of Commonwealth public sector staff. Furthermore, the Code of Conduct, while an admirable statement of values, may be limited in its usefulness due to the generality of some provisions, such as the requirement to 'behave honestly and with integrity', or to 'use Commonwealth resources in a proper manner'.⁴³

3.53 In addition, the committee takes into account the comment of the Public Service Commissioner to the effect that conduct regarded by ACLEI as potentially problematic vis a vis corruption risks may be regarded by the APSC as simply poor practice and bad management.⁴⁴ The committee noted evidence gathered during this inquiry and previous inquiries that instances of misconduct may be indicative of more serious underlying issues.

3.54 The committee has heard from witnesses such as the Commonwealth Ombudsman that the Australian Public Service is subject to increasing incentives and opportunities for corruption to occur at the Commonwealth level.⁴⁵

3.55 The committee considers that ACLEI, with its specialised focus on corruption, particularly serious and organised criminal networks, has a role to play in enhancing the training that is provided to public servants as part of its corruption prevention role.

42 Ms Karin Fisher, APSC, *Committee Hansard*, 14 August 2009, p. 39.

43 APSC, *APS Code of Conduct*, <http://www.apsc.gov.au/conduct/> (accessed 10 June 2011).

44 See, for example, Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, pp 3 & 8.

45 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 2.

The committee is concerned that under the terms of the LEIC Act as it currently stands, ACLEI is not able to contribute this specialised knowledge.

3.56 The committee's interim report addressed ACLEI's ability to proactively engage in corruption prevention measures, noting concerns extending back to the Senate Legal and Constitutional Legislation Committee's inquiry into the bill that established ACLEI.⁴⁶

3.57 The committee reiterates its comments made in the interim report. It considers it essential that ACLEI continues and expands the range of corruption detection and prevention activities currently undertaken. In the interim report, the committee recommended the inclusion of explicit corruption detection and prevention functions under section 15 of the LEIC Act. This recommendation is entirely consistent with the objects of the LEIC Act, which have not been matched by appropriate legislative functions to date.

3.58 As noted in Chapter 2, ACLEI has proposed a third tier jurisdiction including not just law enforcement agencies, but all public service agencies. ACLEI would provide corruption prevention support to this third tier jurisdiction. Specifically, it would have an education function in relation to these agencies, providing corruption prevention advice and conducting awareness raising about corruption risks.⁴⁷ The committee sees value in this proposition as it will strengthen ACLEI's prevention function, in accordance with previous recommendations.

3.59 However, the committee has two main concerns with such a proposal. Firstly, an expanded education role for ACLEI encompassing the entire public service could divert resources away from ACLEI's investigatory functions and its primary focus on law enforcement. Secondly, the committee accepts arguments made by the Public Service Commissioner regarding the need to maintain a coordinated approach to public service-wide education and training. As the Public Service Commissioner noted:

The ethical framework within which the Public Service operates is very broad. The messages that we are sending out are not simply about breaches of the law; our messages are about doing the right thing. It is an ethical construct that is much bigger than a particular focus on corruption. It covers corruption, but it is much bigger than that.⁴⁸

3.60 Mr Sedgwick also stated:

One of the important things there is to minimise the number of separate messages being sent. You confuse people when you send messages that appear to be overlapping and kind of unclear. The code of conduct makes it absolutely crystal clear. If you act illegally or abuse power you are in

46 See Interim report, pp 22–25.

47 See Appendix 3.

48 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 10.

breach of the code of conduct. That is a serious issue. We argue you do not really need another agency to say exactly the same thing.⁴⁹

3.61 Furthermore, the committee does consider that the broader public service should be able to benefit from ACLEI's specialised knowledge and experience relating to corruption. The Integrity Commissioner informed the committee that ACLEI already worked with APSC's Ethics and Advisory Service in order to provide input based on its anti-corruption experience.⁵⁰ The committee is encouraged by this and would like to see such endeavours continue on a formal basis.

3.62 The committee therefore recommends that, rather than establishing a third tier of jurisdiction as proposed by ACLEI, that the APSC work together with ACLEI to inform the education and training that it provides to public servants. Such education and training should include the risks of infiltration or corruption of public servants by serious and organised criminal networks, even outside the realms of law enforcement.

Recommendation 7

3.63 The committee recommends that ACLEI and the Australian Public Service Commission continue to collaborate in the development of ethics training provided to public servants to include corruption prevention using ACLEI's specialised experience and knowledge.

Investigation of breaches of the Code of Conduct

3.64 The heads of Commonwealth agencies have primary responsibility for putting in place systems and processes within their agency to ensure employees understand and carry out their responsibilities under the code of conduct and relevant legislation. Under the Public Service Act, they must also establish procedures for determining breaches of the code of conduct.⁵¹ The APSC supports agency heads through the setting of standards and the issuance of guidance material.⁵²

3.65 The Public Service Commissioner also has evaluation and inquiry functions as follows:

- to evaluate the extent to which agencies incorporate and uphold the APS values;
- to evaluate the adequacy of systems and procedures in agencies for ensuring compliance with the Code of Conduct;
- to inquire into reports made to the Commissioner as mentioned in section 16 (whistleblowing reports);

49 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 8.

50 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, p. 18.

51 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 20.

52 APSC, *Supplementary Submission*, p. 4.

- to consider and report to the Public Service Minister on any matter relating to the APS, including such a matter referred to the Commissioner by the Public Service Minister;
- to inquire into alleged breaches of the Code of Conduct by Agency Heads and report to the appropriate authority on the results of such enquiries (including, where relevant, recommendations for sanctions); and
- to develop, promote, review and evaluate APS employment policies and practices.⁵³

3.66 To support these functions, the Public Service Commissioner is able to conduct special inquiries, with the power to compel witnesses to give evidence and to produce documents. However, these powers are for the purpose of an administrative inquiry and the evidence gathered is not generally admissible in criminal proceedings.⁵⁴

3.67 The committee notes that these evaluation and inquiry functions, including the focus on ensuring the adequacy of procedures and the Ministerial reporting function, mirror to an extent ACLEI's ongoing brief to improve law enforcement agency procedures. In ACLEI's case, the focus is on improving procedures in order to resist corruption and strengthen integrity assurance.

3.68 The committee therefore encourages an increased dialogue between the Integrity Commissioner and the Public Service Commissioner to ensure that ACLEI's specialised knowledge regarding corruption risk, particularly in regard to the potential for infiltration of the public service by organised crime, is shared with the APSC and informs their work in strengthening public service integrity.

Treatment of serious issues

3.69 Where an employee's behaviour may be both a breach of the Code and a serious criminal offence the matter is discussed with the relevant police force, generally the AFP, who may prepare a brief of evidence for the Director of Public Prosecutions.⁵⁵ As the Public Service Commissioner, Mr Stephen Sedgwick noted:

Investigations that raise a question of serious corruption or a breach of the criminal law are usually referred to the police. In some larger agencies they might be investigated by internal fraud units. In either case the outcome could involve both a criminal conviction and a sanction for the breach of the code of conduct.⁵⁶

53 APSC, *Supplementary Submission*, p. 4.

54 APSC, *Submission 2*, p. 3.

55 APSC, *Supplementary Submission*, p. 4.

56 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 3.

3.70 The committee considers that the current arrangement, whereby the AFP are used in the investigation of potentially criminal behaviour is appropriate. However, the committee is also of the view that in certain circumstances, serious potential corruption cases could be referred to ACLEI.

3.71 This would be beneficial due to ACLEI's experience in dealing with corruption issues and corruption risk. Furthermore, involvement of ACLEI in such cases, which would be rare based on the statistics provided by the APSC, would contribute to ACLEI's own knowledge base regarding corruption risk in Commonwealth agencies.

3.72 The Public Service Commissioner, while arguing against extending ACLEI's jurisdiction across the public service, did note the possible attractiveness of being able to involve ACLEI in the investigation of agencies outside its formal jurisdiction but with law enforcement functions.

...I am quite attracted to this notion. If I was an agency head, for example, and parts of me were in the law enforcement business and if I was investigating a case and thought I needed some help, to have the option to go to ACLEI for forensic assistance would actually be a sensible option to have. But that is not the same thing as saying that ACLEI should conduct all of their corruption investigations, particularly if that is an ill-defined term.⁵⁷

Recommendation 8

3.73 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to provide a mechanism by which the Public Service Commissioner, with the consent of the Integrity Commissioner, could request assistance, including on behalf of any head of a Commonwealth agency, in investigating a serious corruption issue. Such a request would be made after consideration of whether ACLEI's unique experience and powers meant that ACLEI could provide greater investigatory value than the Australian Federal Police. Furthermore, to avoid overburdening ACLEI to the detriment of its primary law enforcement focus, such an arrangement should be funded by the requesting agency.

3.74 The committee considers that this recommendation will enhance the existing Commonwealth integrity system. However, the committee notes that it is potentially a half-way measure between the existing system, and a future broader Commonwealth-wide integrity agency. The possible establishment of such an agency is discussed below.

57 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 6.

Commonwealth Fraud Control Guidelines

3.75 In addition to a reliance on the Code of Conduct, the Commonwealth integrity framework also includes the Commonwealth Fraud Control Guidelines. The Guidelines place obligations on agencies and their CEOs in relation to fraud risk assessments, fraud control plans, awareness and training, handling of fraud cases and reporting.⁵⁸

3.76 The Commonwealth Guidelines apply to all agencies covered by the *Financial Management and Accountability Act 1997* (FMA Act) and any bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act) for which the Finance Minister has made a General Policy Order in accordance with section 48A of the CAC Act.⁵⁹

3.77 As noted in the interim report, the committee is concerned that the understanding of what may constitute corrupt behaviour in the public sector has been inadvertently limited by the focus on fraud control. At the time the interim report was tabled, the Commonwealth Fraud Control Guidelines defined corruption as a subset of fraud as follows:

For the purpose of the Commonwealth Fraud Control Guidelines, fraud against the Commonwealth is defined as: Dishonestly obtaining a benefit by deception or other means.

This definition includes:

- theft;
- obtaining property, a financial advantage or any other benefit by deception;
- causing a loss, or avoiding or creating a liability by deception;
- providing false or misleading information to the Commonwealth, or failing to provide information where there is an obligation to do so;
- making, using or possessing forged or falsified documents;
- bribery, corruption or abuse of office;
- unlawful use of Commonwealth computers, vehicles, telephones and other property or services;
- relevant bankruptcy offences; and
- any offences of a like nature to those listed above.⁶⁰

58 *Commonwealth Fraud Control Guidelines 2011*, p. 7.

59 *Commonwealth Fraud Control Guidelines 2011*, p. 1.

60 *Commonwealth Fraud Control Guidelines 2002*, p. 4, emphasis added.

3.78 However, the definition of fraud has changed in the revised guidelines issued in March 2011. Corruption is no longer described as a subset of fraud. Instead, the guidelines note that fraud is a form of corruption, stating:

Agencies also need to be alert to the risk of complex fraud involving collusion between agency employees and external parties. Complex fraud, which may also constitute corrupt conduct, can include instances where an employee or group of employees:

-are targeted and succumb to exploitation by external parties (bribery, extortion, grooming for favours or promises), or

-initiate the misconduct (including through infiltration of an agency by an external party).

Note that some forms of corrupt conduct, such as soliciting for bribes or secret commissions, may not cause a direct loss to the Commonwealth, but may distort the market for fair provision of services or inflate prices.⁶¹

3.79 The committee recognizes that, like other forms of corrupt conduct, fraud is a continuing and evolving risk for the Commonwealth public sector that must be handled effectively. As noted by the ANAO:

[T]he increasing focus on responsive and flexible programs to meet community expectations can expose the Commonwealth to new areas of fraudulent activity that need to be managed.⁶²

3.80 As noted in the committee's interim report for this inquiry, the committee believes that ACLEI has opened the way for a more sophisticated and risk-based approach to understanding public sector corruption, including fraud.

3.81 The committee is therefore encouraged to see the recognition of corruption as a broader issue within the Commonwealth Fraud Control Guidelines.

The Commonwealth Ombudsman

3.82 The Commonwealth Ombudsman is responsible for ensuring procedural fairness and complaint handling across the public service. As noted by the former acting Commonwealth Ombudsman, Ms Vivienne Thom:

The Commonwealth Ombudsman has an important role to play in the integrity framework that applies to Commonwealth law enforcement agencies. This is achieved through our complaint handling, investigation and oversight of law enforcement agencies. In the second reading speech to the introduction of the ACLEI bill, it was noted:

'The Ombudsman will have a continuing role in relation to the AFP and the ACC, except in dealing with corruption issues. This will enable two

61 *Commonwealth Fraud Control Guidelines 2011*, p. 5.

62 ANAO, *Fraud Control in Australian Government Agencies*, Audit Report No. 42 2009–10, p. 12.

complementary approaches to investigation to be brought to bear on different types of issues. Together, the Integrity Commissioner and the Ombudsman will provide the Australian public with the guarantee that the conduct of key Australian government law enforcement agencies is subject to comprehensive external review.⁶³

3.83 The Commonwealth Ombudsman also had a historical role in investigating corruption, as explained by the current Commonwealth Ombudsman, Mr Allan Asher, who stated:

As you would know, in the early days even before ACLEI came into existence, the Ombudsman's office was responsible for some measure of investigations into corruption across the entire Commonwealth system. Indeed, our office was instrumental in part in encouraging the formation of ACLEI and its work in the law enforcement area.⁶⁴

3.84 As noted in the Commonwealth Ombudsman's submission, corruption is less likely to occur in an administrative system that does not tolerate misconduct. As a result, the complaint handling and investigative role of the Commonwealth Ombudsman can make an important contribution to curbing corruption by preventing misconduct and poor administrative behaviour generally.⁶⁵

3.85 As a result, ACLEI and the Office of the Commonwealth Ombudsman share a key relationship within the Commonwealth integrity sphere.

ACLEI's relationship with the Commonwealth Ombudsman

3.86 As noted above, the Integrity Commissioner and the Commonwealth Ombudsman operate in a similar space with a different focus. Where the Integrity Commissioner deals with corruption issues, the Commonwealth Ombudsman is responsible for ensuring due process and handling complaints about misconduct.

3.87 The Commonwealth Ombudsman informed the committee that since the establishment of ACLEI, his office had referred a number of matters to the Integrity Commissioner for investigation. However, ACLEI's focus is not the same as the Commonwealth Ombudsman's, which is to provide remedies or solutions for individuals who make a complaint. For this reason, the Commonwealth Ombudsman noted he had been speaking to ACLEI about mechanisms by which his office could pursue those remedies even while ACLEI investigated the corruption aspect of a matter.⁶⁶

63 Dr Vivienne Thom, Acting Commonwealth Ombudsman, *Committee Hansard*, 14 August 2009.

64 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 1.

65 Commonwealth Ombudsman, *Submission 6*, p. 3.

66 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 3.

3.88 A similar issue, raised by ACLEI, is the difficulty associated with correctly categorising an issue as either corruption or misconduct, thus determining whether a matter is more appropriate for the Commonwealth Ombudsman or the Integrity Commissioner. ACLEI has proposed an amendment to the LEIC Act that would enable easier transfer of an issue that was investigated as a potential case of corruption, but upon examination was found to be an issue of misconduct. As the Integrity Commissioner explained:

I have had some preliminary discussions with the Commonwealth Ombudsman Allan Asher and suggested to him that there could be some matters that he could deal with more conveniently—for instance, corruption issues may start off as an ACLEI assessment or investigation but their disposition may change to, say, an issue that really has more of a focus on practices and procedures or misconduct. It would be convenient to have the ability under the legislation to split those matters with consultation between him and the agency to the Ombudsman's office.

There is a reciprocal ability under the Ombudsman Act. He is required to refer to me corruption issues if he is partway through an investigation that may have had the appearance at the outset of being a misconduct or a practices and procedures matter but it does...in fact take on a corruption dimension so that would be...balancing a reciprocal provision.⁶⁷

3.89 The Integrity Commissioner also noted that such a mechanism could assist in avoiding problems associated with definitions of corruption and the delineation of the boundary between corruption and misconduct.⁶⁸

3.90 The committee agrees that such a mechanism would improve the operation of the LEIC Act, and accordingly recommends the amendment of the LEIC Act to insert a 'more conveniently dealt with' clause similar to that used in the *Ombudsman Act 1976* to address issues of overlapping jurisdiction.⁶⁹

Recommendation 9

3.91 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to include a 'more conveniently dealt with' clause that would enable the Integrity Commissioner to refer to the Commonwealth Ombudsman issues that are not, or through the course of investigation, it is discovered are not, corruption issues but which do relate to misconduct.

67 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, p. 16.

68 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, p. 16.

69 See for example, para. 6(4D)(b) *Ombudsman Act 1976*.

The Australian National Audit Office

3.92 The Auditor-General is broadly responsible for providing assurance around financial statements and analysing ways to improve public administration. As such, it has relatively high level powers to demand access to information. These powers are used in conducting, amongst other functions, performance audits that focus on the effectiveness, efficiency, economy and legal compliance of a program.⁷⁰

3.93 In the course of conducting an audit of a program or agency, the ANAO is potentially an agency that could discover misconduct or corruption. Mr Steve Chapman, Deputy Auditor-General, noted that the ANAO was able to refer such matters to the AFP for investigation, stating:

Confidentiality is very important and highlighted in our act, but it is probably also worth mentioning that we have a particular provision in the Auditor-General Act, section 36(2), which means that we can provide advice to the commissioner for the AFP if disclosure would be in the public interest. That would generally be where we might identify matters of fraud or corruption. We have that opportunity to pass that information on.⁷¹

3.94 However, ANAO officers who appeared before the committee were not aware of any cases in which the ANAO had used this provision to refer a matter to the AFP. Instead, where the ANAO had become aware of such instances, it was generally alerted to the fact by the agency being audited.⁷²

3.95 Mr Chapman informed the committee that both the performance audits and the financial audits undertaken by the ANAO gave due regard to matters of fraud and corruption. ANAO has conducted a series of performance audits focusing on fraud in recent years, and is currently updating a better practice guide to agency fraud control.⁷³

3.96 ACLEI and the ANAO do not have a formal or statutory relationship, however the committee is aware of informal contact between the two agencies over the last year. As the Deputy Auditor-General noted, there is not a high degree of overlap in their activities. Nevertheless, as two agencies operating in the integrity sphere, the committee encourages the development of a closer relationship. This is the subject of the next section of this report.

70 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 35.

71 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 35.

72 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 38.

73 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 35.

Coordinating across the Commonwealth

3.97 As described in the passages above, the Commonwealth integrity system relies on a number of agencies operating in distinct, but potentially overlapping spheres. A number of witnesses and submitters were of the view that this multiagency approach should be subject to greater coordination, including the potential establishment of a Commonwealth Integrity Commission to auspice anti-corruption measures across the public service.

3.98 The committee sees the merit in the arguments put forward by witnesses and submitters in favour of a formal, coordinated integrity structure across the whole of government. However, the terms of reference of this inquiry are restricted to the operation of the LEIC Act and the committee has therefore sought to limit the scope of recommendations made in this report. The committee is however prepared to revisit the issue of a broader Commonwealth Integrity Commission in a future inquiry.

3.99 Through the recommendations contained in this report, the committee has endeavoured to provide a statutory base for ACLEI's cooperation with other integrity and accountability agencies. However, the committee is also in favour of the promotion of regular information sharing and cooperation between those agencies as a matter of course.

3.100 The Integrity Commissioner noted that integrity agencies in the Prime Minister and Cabinet Portfolio meet informally on a regular basis. By virtue of ACLEI's position in the Attorney-General's Portfolio, the Integrity Commissioner has not been part of these meetings, but will attend from this year onwards. The committee considers that regular contact between these agencies and agency heads is vital and encourages such meetings wherever possible.

3.101 Evidence from witnesses and submitters proposing formal structures for the coordination of integrity measures across the Commonwealth fell into two broad categories: a coordination board and a Commonwealth Integrity Commission. Both of these options are canvassed below.

Coordination board

3.102 Professor AJ Brown recommended that a statutory coordination mechanism be established to ensure that 'what has now become an expansion in the number of integrity agencies is properly coordinated'.⁷⁴ He further explained that:

That statutory coordination mechanism would be something that would need to ensure the coordination of investigative activity, intelligence, risk assessment activity, corruption resistance building and prevention activity.⁷⁵

74 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 4.

75 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 4.

3.103 Under the previous Victorian Labour state government, the 'Review of Victoria's integrity and anti-corruption system' had recommended the formation of an Integrity Coordination Board 'to strengthen cooperation and coordination across the integrity system'.⁷⁶ The review proposed that the Board be established by legislation and comprise a membership of core integrity agents. Additional membership would be extended by the Board as required. It was proposed that the Board be empowered to share information and conduct joint investigations as well as jointly conducting research, education and promotion.⁷⁷

3.104 However, the new Coalition government in Victoria has announced that it will establish an 'Independent Broad-Based Anti-Corruption Commission', with the power to investigate allegations of corruption against all politicians and public servants.⁷⁸

Is a broad public sector integrity commission needed?

3.105 Evidence to the inquiry noted the absence of broader public sector anti-corruption oversight at the Commonwealth level and argued that such oversight is required.

3.106 The Commonwealth Ombudsman argued in favour of a broader Commonwealth integrity agency on the basis that the incentives and opportunities for corruption are increasing as the Commonwealth becomes more involved with directly funding activities.⁷⁹

3.107 Mr Howard Whitton endorsed the Commonwealth Ombudsman's view, noting that a Commonwealth-wide integrity commission, including all public functions and public bodies, would be in accordance with Australia's obligations under the UN Convention Against Corruption.⁸⁰

3.108 Transparency International Australia also argued in favour of a broader integrity commission, stating that:

Corruption is not limited to law enforcement agencies. Urgent consideration should be given to expanding ACLEI's jurisdiction across the Commonwealth Public Service with a view to ensuring consistent and

76 Public Sector Standards Commissioner, *Review of Victoria's integrity and anti-corruption system*, 2010, p. 33.

77 Public Sector Standards Commissioner, *Review of Victoria's integrity and anti-corruption system*, 2010, pp 33–34.

78 'Integrity of Government', Premier's Message, <http://premier.vic.gov.au/our-commitment/integrity-of-government/> (accessed on 5 March 2011).

79 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, pp 1–2.

80 Mr Howard Whitton, Fellow, ANZSOG Institute for Governance, *Committee Hansard*, 21 March 2011, p 10.

meaningful promotion of standards of integrity within it and federal agencies.⁸¹

3.109 Similarly, Professor AJ Brown and Mr Peter Roberts submitted that:

Currently there are very large areas of important Commonwealth public administration which are not subject to effective review and oversight in relation to the management of integrity risks and integrity breaches. While it is valid and sensible for the Commonwealth Parliament to prioritise those areas of activity which should be subject to closer scrutiny and oversight than others, the fact is that all agencies and departments should be included in these elements of the Commonwealth's overall integrity system.⁸²

3.110 Reflecting on the 'Utgate affair' Professor Brown remarked:

This illusion that the Commonwealth is somehow magically better than the states is one of the reasons why it has been going backwards to the extent that it is there at a rate of knots.⁸³

3.111 Mr Peter Bennett from Whistleblowers Australia also argued there is a need for a broad public sector integrity commission at the Commonwealth level, explaining that there are presently limited avenues for whistleblowers to take their concerns. Mr Bennett stated:

The question is: is there an issue of maladministration and corruption in the federal public sector and the answer is yes.

... As the president of Whistleblowers Australia I would have to get a call three times a week from people involved in the public sector saying, 'Things are going wrong and I do not know how to fix it.' Frankly I cannot tell them how to fix it either. All I can tell them is how to protect themselves from the damage that is likely to occur if they tell anybody about it. That is what I am limited to.⁸⁴

3.112 Rodda Castle & Co submitted that parliamentary committees require an 'independent authority' with the status of a 'standing judicial commission' to which matters can be referred that have been brought to the committees' attention during the inquiry process and warrant further investigation.⁸⁵ The submission contains an example in which such an authority could have been used.

81 Transparency International Australia, *Submission 13*, p. 1.

82 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, p. 2.

83 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 17.

84 Mr Peter Bennett, Whistleblowers Australia, *Committee Hansard*, 16 October 2009, pp 20–22.

85 Rodda Castle & Co, *Submission 19*, p. 3.

3.113 Mr Graham MacAulay, President of the Westpoint Investors Group, submitted that Commonwealth government agencies require integrity oversight and singled out the Australian Securities and Investments Commission in particular.⁸⁶

3.114 Other witnesses, however, described the present integrity system as sufficiently robust. For example, the APSC stated:

The commission's position is that we do not believe the APS needs a full-blown state ICAC style anticorruption commission. The view has been that that would be overkill given that there are a number of agencies that already have jurisdiction in that component. Already we have found that there has not been the systemic corruption that has been the subject of what has happened in the state systems.⁸⁷

3.115 The Merit Protection Commissioner, Ms Annwyn Godwin, noted that one of the key differences between the state and federal levels was the personal relationships that developed at the state level. By contrast, the Australian Public Service focused on national issues and as such experienced a more distant relationship with clients and stakeholders.⁸⁸

3.116 Furthermore, the Public Service Commissioner was of the opinion that there was not enough evidence of the need for a broader Commonwealth integrity body to justify the presumably high costs of such a body's establishment.⁸⁹

3.117 Mr Tim Smith, Chair of the Accountability Round Table argued the opposite, stating:

In looking at cost, we tend not to look at the cost of not doing it. As I discovered, the problem you run into immediately there is that it is very hard to cost, particularly when it goes undetected, as it often does. But consider the damage done to the reputation of government, of politicians, of public servants internationally and domestically by some of the matters that have been mentioned today. What price do you put on that? What effect does that conduct—and, in particular, the failure to do anything about it—have on community views about appropriate standards of behaviour in the community? These are significant costs, I suggest, and they need to be taken into account.⁹⁰

86 Mr Graham MacAulay, *Submission 7*, p. 1.

87 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 23.

88 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 22.

89 Mr Steven Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 6.

90 Professor Tim Smith, Accountability Round Table, *Committee Hansard*, 11 February 2011, p. 46.

3.118 Professor John McMillan noted that while he does not see a need for a broad integrity commission such a development is inevitable:

It is foreseeable that at some time in the future the Commonwealth will choose to establish a broader integrity commission. I see that happening sometime in the future because it is happening more in the states. It will possibly happen in Victoria. We will wait to see the report of the committee that is looking at it. It has already happened recently in an initial way in Tasmania. When it has happened in all the states, it will be hard for the Commonwealth to resist the call to establish a broader integrity commission with a corruption focus.

The other reason I see it happening sometime in the future is because the Commonwealth in our region of the world has strongly argued that neighbouring countries should take similar steps in reviewing their integrity framework and consider this as an option, and that they should be guided by the principles in the United Nation Convention against Corruption. That said, I do not see any demonstrated need for it at this stage.⁹¹

3.119 The committee notes that since Professor McMillan appeared before the committee, Victoria has opted to establish a public sector integrity commission with jurisdiction over all Victorian public sector bodies, local government and state government officials.⁹² However, there is uncertainty over the precise model that may be used in Victoria.⁹³

The right model for the Commonwealth

3.120 The Department of Prime Minister and Cabinet advised that while it is aware of developments around the states it has not undertaken work on the development of such an anti-corruption mechanism at the Commonwealth level.⁹⁴

3.121 The committee did receive some evidence concerning the best model for the Commonwealth. For example, Professor AJ Brown informed the committee that:

[I would] create a new general anti-corruption agency alongside ACLEI and alongside the Commonwealth Ombudsman's Office, or I would make it a division of the Commonwealth Ombudsman's Office. I would still give it jurisdiction over all Commonwealth agencies. I would not try to redraw the boundaries so that it was confined to non-law enforcement, because ACLEI was there to deal with law enforcement and that is just creating a gap within

91 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 4.

92 'Integrity of Government', Premier's Message, <http://premier.vic.gov.au/our-commitment/integrity-of-government/> (accessed 5 March 2011).

93 Professor Tim Smith, Accountability Round Table, *Committee Hansard*, 11 February 2011, p. 48.

94 Department of Prime Minister and Cabinet, correspondence to committee secretariat (received 22 June 2010).

which things are going to be invited to fall. I would still give it a general jurisdiction and, therefore, use it as a catch-all backup...⁹⁵

3.122 The Integrity Commissioner stated his preference that ACLEI remain a specialist agency in the event that broader public sector integrity oversight is introduced at the Commonwealth level in the future. Mr Moss explained that:

ACLEI has been going about 2½ years and has developed a focus and an expertise in its particular focused area. For the role of ACLEI to be something broader and to expand quickly to encompass a whole range of other agencies would virtually mean starting again. I do not think that ACLEI could absorb those additional responsibilities. It would be the wrong way to go about it, anyway. You would want to start afresh and start on a new premise, which is not the premise on which ACLEI was established.⁹⁶

3.123 One suggestion introduced by the Attorney General's Department would be to merge ACLEI with the Commonwealth Ombudsman's Office. The Department stated:

[An] option would be to combine ACLEI with the Office of the Commonwealth Ombudsman to consolidate the Commonwealth's anti-corruption arrangements.⁹⁷

3.124 However, this proposal was not endorsed by anti-corruption experts and practitioners. Professor AJ Brown noted there are risks in such an approach. In particular he pointed to the risk that the anti-corruption function could be pushed aside in order to direct limited resources to the Ombudsman primary function of complaint handling.

There are a number of implications for the idea of rolling ACLEI back into the Ombudsman's Office and I think there are a lot of dangers in that. Unless it is done as part of a very sophisticated strategy with quite a lot of legislative reform, and again unless it is done with a view to the design of the whole system, it is potentially a recipe for yet again giving the Ombudsman a specialist function and then in a few years time when the budget gets tight it starts to get absorbed and consumed by other complaint handling functions, which are always the great chewer upperer of resources in any Ombudsman's Office. There are all sorts of complexities. I would respond to that suggestion—having come late and somewhat inconsistently in the piece—from the Attorney-General's Department with a bit of scepticism.⁹⁸

95 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 3.

96 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 7.

97 Attorney-General's Department, answer to question on notice, 14 August 2009 (received 12 October 2009), p. 3.

98 Professor AJ Brown, *Committee Hansard*, 16 October 2009, pp 5–6.

3.125 Professor John McMillan was able to reflect on this proposal from the perspectives of his role as former Acting Integrity Commissioner of ACLEI and former Commonwealth Ombudsman. Professor McMillan expressed the opinion that such a merger, while 'theoretically possible', would not work well in practice and gave three reasons as outlined below:

One is that there is a different skill set. Having worked in both agencies, I know that the skill set in the staff of the Ombudsman's office was quite different to the skill set in ACLEI. Of course the Ombudsman's office could acquire extra staff, but at the moment the skill set is different. ACLEI, in particular, has people with a lot more forensic investigation experience and a much closer understanding of law enforcement.

The second is that ACLEI has all of these intrusive and coercive powers. Until recently those were not exercised so it was more a theoretical issue about whether it could be combined, but as I understand it ACLEI at least has facilities and staff for exercising those functions. I understand from some things I have seen in the media that those functions are being exercised. They are not functions that are appropriate for an ombudsman's office, in my view.

Thirdly, of course the Ombudsman has a role in overseeing the exercise of those functions by ACLEI. The Ombudsman has a large auditing and monitoring role for the exercise by law enforcement agencies generally of telephone interception, controlled operations, electronic surveillance and so on. If the Ombudsman and ACLEI's functions were combined, there would be a need to create some other agency or oversight function.⁹⁹

3.126 The committee agrees with the appraisals of Professors Brown and McMillan and does not consider that further attention should be directed to this option.

3.127 The question of a broad public sector integrity commission is tangential to the terms of reference for this inquiry. The committee considers, however, that it has received sufficient evidence indicating there is an oversight gap at the Commonwealth level to warrant further examination by this committee or another appropriate body.

3.128 For this reason, the committee recommends that the Australian Government conduct such an examination, including consideration of the following five issues as identified by Professor AJ Brown:

- how to bring all federal officeholders within a realistic scheme of integrity scrutiny;
- how to include senior officials such as ministers within the scheme;
- how to ensure that information about integrity breaches is rapidly transmitted to the place where most effective action can be taken;

99 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 5.

- how proactive integrity-building and corruption resistance strategies, rather than reactive investigations into alleged integrity breaches, are best pursued and monitored across the public sector; and
- how the different integrity institutions are best to be coordinated.¹⁰⁰

3.129 The committee notes the valuable expertise established by ACLEI in the area of corruption and law enforcement, and would see a continuing role for ACLEI in this area, either as a stand-alone agency or as a separate section within a broad-based Commonwealth integrity commission.

Recommendation 10

3.130 The committee recommends that the Australian Government conduct a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity commission with anti-corruption oversight of all Commonwealth public sector agencies, taking into account the need to retain the expertise of ACLEI in the area of law enforcement.

100 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, Attachment 1, p. 10.

Conclusion

Is the existing system enough?

3.131 The committee is satisfied that the recommendations made in its interim report and this final report will significantly improve law enforcement integrity through the operation of the LEIC Act. In addition, several of the recommendations will, if adopted, begin to provide greater assurance of integrity across the Australian Public Service.

3.132 However, while the current efforts of agencies including the APSC, the Commonwealth Ombudsman, the ANAO and ACLEI contribute to Commonwealth integrity, the committee is left with the impression that more needs to be done.

3.133 This inquiry sought to examine the adequacy of the LEIC Act. However, in conducting the inquiry, the committee received evidence that suggested the need for anti-corruption measures that extend beyond narrowly defined law enforcement functions to all public sector agencies and actors.

3.134 The committee recognises that there is very little evidence of serious or systemic corruption in the Australian Public Service. However, it is also of the view that there is an insufficient detection capability. As the Premier of Queensland, the Hon Ms Anna Bligh MP, noted in a speech reflecting on that state's approach to integrity in the aftermath of the Fitzgerald inquiry:

Despite the inevitable embarrassment from time to time, I would much rather live and work in a system which is not afraid to pick up the rock and discover the ugliness underneath than one that is content to leave the rock alone and assume that an undisturbed rock is a sign of good health.¹⁰¹

3.135 In short, the committee agrees with an approach that assumes the existence of corruption in a system full of risks. In the present state of affairs, there could be a lot of 'undisturbed rocks' that need to be overturned if the public is to be fully assured that integrity in the public sector is being properly maintained and safeguarded.

3.136 For this reason, in addition to the recommendations proposed in this inquiry, the committee will remain seized of this issue in the future.

Ms Melissa Parke MP
Chair

101 The Hon Ms Anna Bligh MP, Premier of Queensland, *Australian Public Sector Anti-Corruption Conference Speech*, 29 July 2009, <http://www.thepremier.qld.gov.au/newsroom/2009/anti-corruption.aspx> (accessed 3 June 2011).

Appendix 1

List of submissions, additional information and answers to questions on notice

- 1 Australian Federal Police Association
- 2 Australian Public Service Commission
- 3 Dr Jann Karp PhD
- 4 Great Barrier Reef Marine Park Authority
- 5 CrimTrac
- 6 Commonwealth and Law Enforcement Ombudsman
- 7 Mr Graham MacAulay
- 8 Australian Government Child Support Agency
- 9 Department of Education, Employment and Workplace Relations
- 10 Australian Federal Police
- 11 Mr Richard Smolenski
- 12 Attorney-General's Department
- 13 Transparency International Australia
- 14 Australian Commission for Law Enforcement Integrity (ACLEI)
- 15 Professor AJ Brown (Griffith Law School) and Mr Peter Roberts (Charles Sturt University)
- 16 Department of Immigration and Citizenship
- 17 Australian Crime Commission

- 18 Whistleblowers Australia
- 19 Rodda Castle & Co
- 20 Confidential
- 21 Confidential
- 22 Confidential
- 23 Accountability Round Table
- 24 Mr Howard Whitton, ANZSOG Institute for Governance, University of Canberra

Additional Information Received

- 1 Correspondence from the Department of the Prime Minister and Cabinet (dated 22 June 2010)

Answers to Questions on Notice

- 1 Australian Public Service Commission, 14 August 2009 (received 31 August 2009)
- 2 Australian Commission for Law Enforcement Integrity, 14 August 2009 (received 14 September 2009)
- 3 Commonwealth and Law Enforcement Ombudsman, 14 August 2009 (received 8 September 2009)
- 4 Attorney General's Department, 14 August 2009 (received 12 October 2009)
- 5 Australian Taxation Office, 23 October 2009 (received 25 October 2009)
- 6 Australian Commission For Law Enforcement Integrity, 4 February 2010 (received 10 February 2010)
- 7 Australian Public Service Commission, 11 February 2011 (received 7 March 2011)
- 8 Australian Public Service Commission, 11 February 2011 (received 7 March 2011), Appendix A

- 9** Australian Public Service Commission, 11 February 2011 (received 7 March 2011), Appendix B
- 10** Australian Public Service Commission, 11 February 2011 (received 7 March 2011), Appendix C
- 11** Mr Howard Whitton, 21 March 2011 (received 22 March 2011)
- 12** AUSTRAC, 9 May 2011 (received 6 June 2011)
- 13** Department of Agriculture, Fisheries and Forestry, 9 May 2011 (received 24 May 2011)

Appendix 2

Public hearings and witnesses

Friday, 14 August 2009 – Canberra

Australian Commission for Law Enforcement Integrity

Mr Philip Moss, Integrity Commissioner
Mr Peter Bache, Acting Executive Director
Mr Anthony Vincent, Principal Lawyer
Mr Nicholas Sellars, Manager, Policy and Research

Australian Public Service Commission

Ms Annwyn Godwin, Merit Protection Commissioner
Ms Karin Fisher, Group Manager, Ethics Group

Attorney-General's Department

Ms Elizabeth Kelly, First Assistant Secretary, Criminal Justice Division
Ms Sarah Chidgey, Assistant Secretary, Criminal Justice Division
Ms Gemma Smyth, Acting Director, Law Enforcement Policy

Office of the Commonwealth Ombudsman

Ms Vivienne Thom, Acting Commonwealth Ombudsman
Ms Diane Merryfull, Senior Assistant Ombudsman

Friday, 16 October 2009 – Brisbane

Professor Alexander Brown, Professor of Public Law, Griffith University

Whistleblowers Australia

Mr Peter Bennett, National President

Friday, 23 October 2009 – Canberra

Mr Richard Smolenski, Private capacity

Mr Robert Spanswick, Private capacity

Australian Federal Police

Commander Mark Walters, Manager, Professional Standards
Mr Peter Whowell, Manager, Policy and Planning
Assistant Commissioner Paul Jevtovic, Acting Chief Operating Officer

CrimTrac

Ms Theresa Van Gessel, Manager, Policy and Legal Team

Australian Customs and Border Protection Service

Mr Michael Carmody, Chief Executive Officer

Ms Roxanne Kelley, National Director, Enforcement and Investigations

Mrs Donna Storen, National Manager, Internal Affairs

Australian Crime Commission

Mr Michael Outram, Executive Director, Serious Organised Crime

Ms Jane Bailey, Executive Director, People and Business Support

Australian Taxation Office

Mr Michael Cranston, Deputy Commissioner

Mr Paul Malone, Assistant Commissioner

Department of Immigration and Citizenship

Ms Alison Larkins, First Assistant Secretary, Compliance and Case Resolution Division

Mr Hamish Lindsay, Acting Assistant Secretary, Program Integrity Risks Branch

Mr Benjamin Noyen, Acting Assistant Secretary, People Services Branch

Thursday, 4 February 2010 - Canberra

Australian Commission for Law Enforcement Integrity

Mr Philip Moss, Integrity Commissioner

Mr Peter Bache, Acting Executive Director

Mr Nicholas Sellars, Acting Director, Policy and Research

Thursday, 27 May 2010 - Canberra

Professor John McMillan, AO, Private capacity

Friday, 11 February 2011 – Canberra

Australian Public Service Commission

Mr Stephen Sedgwick, Public Service Commissioner

Ms Annwyn Godwin, Merit Protection Commissioner

Ms Karin Fisher, Group Manager, Ethics

Australian Commission for Law Enforcement Integrity

Mr Philip Moss, Integrity Commissioner

Mr Stephen Hayward, Executive Director

Mr Nicholas Sellars, Director Strategic Support

Ms Sarah Baker-Goldsmith, Acting Principal Lawyer

Transparency International Australia

Mr Michael Ahrens, Executive Director

Australian National Audit Office

Mr Steve Chapman, Deputy Auditor-General

Mr Matt Cahill, Group Executive Director, Performance Audit Services Group

Accountability Round Table

The Hon Tim Smith QC, Chair

Monday, 21 March 2011 – Canberra**Office of the Commonwealth Ombudsman**

Mr Allan Asher, Ombudsman

Mr Adam Stankevicius, Senior Assistant Ombudsman

Mr Howard Whitton, Fellow, ANZSOG Institute for Governance, University of Canberra

Appendix 3

A tiered model for jurisdiction¹

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.

§ Please note that while ACLEI's submission did not include 'own initiative' inquiry and investigation for the second tier, the committee recommends that this be the case.

¹ Table source: ACLEI, *Submission 14*, p. 32.

Appendix 4

Examples of corrupt behaviour within the law enforcement context¹

Abuse of office

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

- 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;
- improperly 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.

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

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;

1 Source: *Annual Report of the Integrity Commissioner 2008-2009*, pp 69-71.

- 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 privileged access to information for personal purposes.

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 evade scrutiny of criminal activity.

Conduct that misuses information* to support or assist 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 law enforcement methods, practices or targets.

*‘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;
- assumed identities;
- detection or investigation methods;
- criminal methods;

-
- planned law enforcement actions or investigations (for example, a ‘tip- off’ about a pending execution of search warrants or a timetable for regulatory inspections or interdictions);
 - information technology or computer databases (that may assist hackers); or
 - anything else that could provide an advantage to criminal activity.

Perversion of the course of justice

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.

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

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.

Conduct that places at risk the impartial function of an agency

- 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.

Conduct that facilitates corruption

- failure to declare conflicts of interest or improper associations;
- failure of supervisor to manage or treat conflicts of interest raised or declared by staff;
- 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.

Appendix 5

Definition of corruption in the *Independent Commission Against Corruption Act 1998 No. 35 (NSW)*

7 Corrupt conduct

- 1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.
- 2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).
- 3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

8 General nature of corrupt conduct

- 1) Corrupt conduct is:
 - a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
 - b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
 - c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
 - d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
- 2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or

body of public officials or any public authority and which could involve any of the following matters:

- a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
- b) bribery,
- c) blackmail,
- d) obtaining or offering secret commissions,
- e) fraud,
- f) theft,
- g) perverting the course of justice,
- h) embezzlement,
- i) election bribery,
- j) election funding offences,
- k) election fraud,
- l) treating,
- m) tax evasion,
- n) revenue evasion,
- o) currency violations,
- p) illegal drug dealings,
- q) illegal gambling,
- r) obtaining financial benefit by vice engaged in by others,
- s) bankruptcy and company violations,
- t) harbouring criminals,
- u) forgery,
- v) treason or other offences against the Sovereign,
- w) homicide or violence,
- x) matters of the same or a similar nature to any listed above,

-
- y) any conspiracy or attempt in relation to any of the above.
- 3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- 4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.
- 5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:
- a) matters arising in the State or matters arising under the law of the State, or
 - b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- 6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

- 1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
- a) a criminal offence, or
 - b) a disciplinary offence, or
 - c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.
- 2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- 3) For the purposes of this section:

applicable code of conduct means, in relation to:

- a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

- b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

- 4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
- 5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.
- 6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the Local Government Act 1993, but does not include a reference to any other breach of such a requirement.