



Australian Government

Australian Commission for
Law Enforcement Integrity

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Mr Craig Kelly MP
Chair, Joint Committee on Law Enforcement
Parliament House
CANBERRA ACT 2600

Dear Chair

Inquiry into the impact of new and emerging ICT

I thank you for your invitation to make a submission to the Committee's Inquiry.

The Australian Commission for Law Enforcement Integrity (ACLEI) has a special role in the Australian Government's anti-corruption framework. With a focus on those agencies with law enforcement functions that operate in high-corruption risk environments, ACLEI is the only Commonwealth agency dedicated solely to the prevention, detection and investigation of corrupt conduct. A summary of ACLEI's role, responsibilities and powers is attached.

As you will note, the Integrity Commissioner has a power under the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) to examine witnesses on oath in coercive hearings. However, ACLEI can also be regarded as a law enforcement agency, and has a statutory role in assembling evidence of criminal offences arising from investigations relating to corrupt conduct.

Much of the information gathered by ACLEI occurs covertly—including through lawful access to digital records, and by using electronic surveillance capabilities. Often, ACLEI uses covertly-obtained material as a basis to collect additional information using its other investigatory tools—such as by issuing a summons for a person to attend a private hearing to give evidence, or corroborating information in another way (including by issuing notices to produce documents, or by conducting a search of premises under warrant).

Many of the potential challenges for law enforcement investigation capability arising from new and emerging ICT—encryption, multiple data storage platforms, dark web, cryptocurrency, social media and messaging apps—have been broadly referred to as “going dark”.¹ The Attorney-General, Senator the Hon. George Brandis QC, responded promptly to the concerns of law enforcement agencies in this regard—including ACLEI's—by introducing the Data Retention regime, through amendment in 2016 of the *Telecommunications (Interception and Access) Act 1979*, which ensures critical telecommunications metadata is retained by service provider companies for law enforcement purposes.

¹ *Going Dark: Are Technology, Privacy, and Public Safety on a Collision Course?* James B. Comey, Director, Federal Bureau of Investigation. Address to the Brookings Institution, Washington DC. October 16, 2014.

Ensuring access to retained data has been an important measure in the fight against organised crime and corruption. Even so, encryption and other counter-ICT surveillance methods being used by criminal groups continue to impact law enforcement reach and efficiency. As to their effect on ACLEI, we have already started to adapt our operational strategies using the statutory framework presently available to us, including an increased need for:

- physical surveillance
- human source intelligence
- reaching agreements with private and public entities to access collected data for a law enforcement purpose (having regard to legislative protections)
- better data management, connectivity of internal data sets
- dissemination of information and intelligence to (and from) other entities
- computer forensics
- forensic accounting, and
- coercive hearings, held under Part 9 of the LEIC Act.

However, these strategies can be more labour intensive and costly alternatives when compared to strategies based around “traditional” telephone interception and related tactics. These alternative strategies also tend to increase the risk that a person of interest will become aware of ACLEI’s investigation at an earlier point than is presently the case, potentially compromising or limiting investigation strategies.

A supplementary strategy that warrants close consideration is the introduction of a statutory framework for Delayed Notification Search Warrants (DNSW) relating to serious crime and corruption offences. A similar power is available to New South Wales Police (in the context of certain high-level criminal offences), and to the Australian Federal Police (in respect of certain terrorism offences). Since corruption thrives on secrecy—and law enforcement corruption thrives on insider knowledge to hide tracks and avoid detection—a DNSW regime would be a particularly valuable means of ACLEI obtaining information covertly, especially when the effectiveness of ICT surveillance methods may become more limited in future.

The full scope of threats and opportunities facing all law enforcement agencies from changes in the ICT landscape—including, big data, facial recognition and biometrics, integrity of evidence, and ethics—are broader than the issues I have focussed on in this submission. Accordingly, ACLEI will pay close attention to the progress and outcomes of the Committee’s Inquiry.

I recognise the Committee for bringing a timely focus to this important topic.

Yours sincerely

Michael Griffin AM
Integrity Commissioner

ATTACHMENT ONE

OVERVIEW OF ACLEI

Establishment

The office of Integrity Commissioner, and ACLEI, are established by the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). The objects of the LEIC Act (at section 3) are:

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

ACLEI's strategic purpose—through performance of functions prescribed by the LEIC Act—is to make it more difficult for corruption in law enforcement agencies to occur or remain undetected. The LEIC Act provides the basis for ACLEI's purpose and activities.

The LEIC Act agencies—those agencies subject to the Integrity Commissioner's jurisdiction—are:

- the Australian Criminal Intelligence Commission (ACIC)—including the Australian Crime Commission (ACC), the former CrimTrac Agency and the former National Crime Authority
- the Australian Federal Police (AFP), including Australian Capital Territory Policing
- the Australian Transaction Reports and Analysis Centre (AUSTRAC)
- the Department of Immigration and Border Protection (DIBP), including the Australian Border Force (ABF) [noting that the Home Affairs Department, once established, will succeed DIBP, and remain as part of ACLEI's jurisdiction]
- prescribed aspects of the Department of Agriculture and Water Resources (DAWR), and
- other agencies with law enforcement functions, which may be added by regulation.

ACLEI's role

ACLEI's primary role is to detect and investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. Subject to procedural fairness requirements, the Integrity Commissioner may make administrative findings about the conduct of individuals.

When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws or administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for changes.

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

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

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

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio.

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

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

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

Receiving and disseminating information about corrupt conduct

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

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency—also known as *mandatory reporting*.

The LEIC Act also enables any other person—including members of the public, other government agencies or the Minister—to refer a corruption issue to the Integrity Commissioner.

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

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

The Integrity Commissioner may disclose information to the head of a law enforcement agency or other government agency if satisfied that it is appropriate to do so, having regard to the functions of the agency concerned.

The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988*, reflecting the importance of ACLEI's information collection and intelligence-sharing role.

To safeguard information—for instance to protect a person's safety or reputation from unfair harm—the LEIC Act establishes comprehensive confidentiality requirements for ACLEI staff.

Investigation options

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI's jurisdiction.

The Integrity Commissioner is not expected to investigate every allegation or information about corruption that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner's role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed appropriately.

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

- investigate the corruption issue
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI) and to report findings to the Integrity Commissioner
- refer the corruption issue to the AFP (if the corruption issue does not relate to the AFP)
- investigate the corruption issue jointly with another government agency or an integrity agency for a state or territory, or
- take no further action.

Under the LEIC Act, the Integrity Commissioner must give priority to serious or systemic corruption. Section 27 of the LEIC Act also sets out criteria to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue. With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement.

Accordingly, the Integrity Commissioner gives strategic priority to corruption issues that may:

- indicate a link between law enforcement corruption and organised crime
- relate to law enforcement activities that have a higher inherent corruption risk
- involve suspected conduct which would seriously undermine an agency's law enforcement functions
- bring into doubt the integrity of senior law enforcement managers
- warrant the use of the Integrity Commissioner's information-gathering powers, or
- would otherwise benefit from independent investigation.

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act. In this way, ACLEI aims to pursue those investigations which are most likely to yield the highest strategic contribution to maintaining and improving integrity in law enforcement agencies.

Investigation powers

Due to the adverse consequences of law enforcement related corruption, ACLEI has access to a range of statutory law enforcement, coercive and other powers, including:

- coercive notices to produce information, documents or things
- summons to attend a coercive information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things (or else face criminal prosecution or action for contempt)
- intrusive information-gathering (covert)
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities
 - integrity testing (in relation to the ACIC, AFP and DIBP)
 - scrutiny of financial transactions, and
 - access to specialised information databases for law enforcement purposes
- search warrants
- right of entry to law enforcement premises and associated search and seizure powers, and
- arrest (relating to the investigation of a corruption issue).

Purpose of coercive powers

Investigations of law enforcement corruption often involve suspects and witnesses who are well-versed in law enforcement methods and therefore may be skilled in avoiding or countering them to avoid detection. For instance, counter-surveillance skills, the ability to conceal activities ('hide tracks') or the capacity to divulge confidential information to others ('tip-offs') may be the commodity that makes a criminal conspiracy possible or attractive to undertake.

A particular challenge in this context is to ensure that anti-corruption investigations are able to uncover the full network of people involved—for instance law enforcement officials and their criminal counterparts—rather than stop at the point of having identified a 'bad apple'. It is also important to seek to gain contemporary information about what methods are being exploited to compromise systems, so that 'target hardening' can take place.

To help meet these challenges, Part 9 of the LEIC Act establishes arrangements for the Integrity Commissioner to use coercive information-gathering powers during an ACLEI investigation or joint investigation. These powers require a person to produce documentary evidence and/or appear as a witness and answer questions truthfully at a hearing. It is an offence not to comply with a coercive notice or summons, not to answer questions (even if to do so would tend to self-incrimination), not to answer truthfully, or otherwise be in contempt of ACLEI. The Integrity Commissioner may also issue a non-disclosure direction in relation to coercive notices, summonses and any information provided. This measure assists ACLEI to continue to investigate a matter covertly.

Coercive powers are an important part of the suite of investigation powers available to the Integrity Commissioner. 'Notices to produce'—for instance, to obtain bank account details when warranted—assist ACLEI to build an intelligence picture. Hearings—particularly when combined with other law enforcement investigation methods—enable ACLEI to further investigations that might otherwise stall through lack of conventional investigation options.

Evidence given by a witness at a hearing (ie hearing material) may not be used in a criminal prosecution against that witness, unless it falls within one of the limited exceptions set out in subsection 96(4A) of the LEIC Act—thereby protecting the privilege against self-incrimination. For instance, such material may be used in confiscation proceedings (where the hearing occurred before the proceedings were commenced against the witness, or before such proceedings were imminent). Similarly, hearing material may be used in a disciplinary proceeding relating to the hearing witness (if the witness is in ACLEI's jurisdiction). The privilege against self-incrimination also applies to a person who gives information, or produces documents, in response to a coercive notice.

Corruption prevention

ACLEI's approach to preventing corruption is to work closely with LEIC Act agencies to share information and insights that might strengthen anti-corruption arrangements. For instance, ACLEI's Corruption Prevention Practice distils intelligence from a variety of sources—including lessons learned from ACLEI operations—to identify vulnerabilities in practices and procedures of agencies. These insights also inform Commonwealth anti-corruption policy more generally.

ACLEI publishes case studies and investigation reports to its website, as well as articles designed to assist corruption prevention practitioners.