



Australian Government

**Australian Commission for
Law Enforcement Integrity**

**The Senate
Legal and Constitutional Affairs
Legislation Committee**

*Inquiry into the
Australian Border Force Bill 2015 and the
Customs and Other Legislation Amendment
(Australian Border Force) Bill 2015*

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

27 March 2015

ACLEI Submission: Inquiry into the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015.

1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee. This submission relates to the Committee's inquiry into the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015.

In summary, having regard to the objective of strengthening Australia's law enforcement and border arrangements, ACLEI supports the integrity measures contained in the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015.

To assist the Committee, [Part 2](#) of this submission provides background about ACLEI's role and responsibilities. [Part 3](#) sets out the context for the integrity related components of the Bills. ACLEI's comments about the anti-corruption related aspects of the Bills are in [Part 4](#).

2. Role and responsibilities of ACLEI

Establishment

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

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

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

The agencies currently subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission (ACC), the Australian Customs and Border Protection Service (ACBPS), the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the CrimTrac Agency, prescribed parts of the Department of Agriculture, and the former National Crime Authority.

Role

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

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

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ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or the administrative practices of government agencies with law enforcement functions that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed.

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
- an issue about corruption generally in law enforcement, 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. The Minister for Justice is responsible for ACLEI.

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 (section 19).

The LEIC Act also enables any other person, including members of the public or 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* 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.

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Special legislative arrangements make it lawful for 'whistle-blowers' 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, having regard to the functions of the agency concerned, it is appropriate to do so.

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

Investigation options

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

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

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

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement. Under the LEIC Act, the Integrity Commissioner must also give priority to serious or systemic corruption.

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

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

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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

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be familiar with law enforcement methods, and may be skilled at countering them in order to avoid scrutiny. As a consequence, ACLEI has access to a range of special law enforcement powers.

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

- notices to produce information, documents or things
- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things
- intrusive information-gathering (covert)
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities
 - integrity testing (in relation to the ACBPS, ACC and AFP only)
 - 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).

It is an offence not to comply with notices, not to answer truthfully in hearings, or otherwise to be in contempt of ACLEI.

3. Integrity Context

The Australian Border Force Bill 2015, which would enable the operation of the Australian Border Force (ABF) within the Department of Immigration and Border Protection (DIBP) from 1 July 2015, was introduced into the Parliament on 25 February 2015. Amongst other measures, the Bill takes account of certain existing integrity arrangements in the ACBPS—namely, drug and alcohol testing, a framework for Chief Executive Orders relating to integrity, and provision for modified review rights when a termination of employment is for reasons of serious misconduct and a serious misconduct declaration has been made—and extends them to DIBP.

Schedule 6 of the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015, introduced the same day, proposes that the whole of the DIBP (including ABF) would commence as part of ACLEI's jurisdiction from 1 July 2015, by amendment to the *Law Enforcement Integrity Commissioner Act 2006*. In addition, another integrity arrangement that presently applies to the ACBPS—namely, integrity testing—would apply in relation to DIBP staff.

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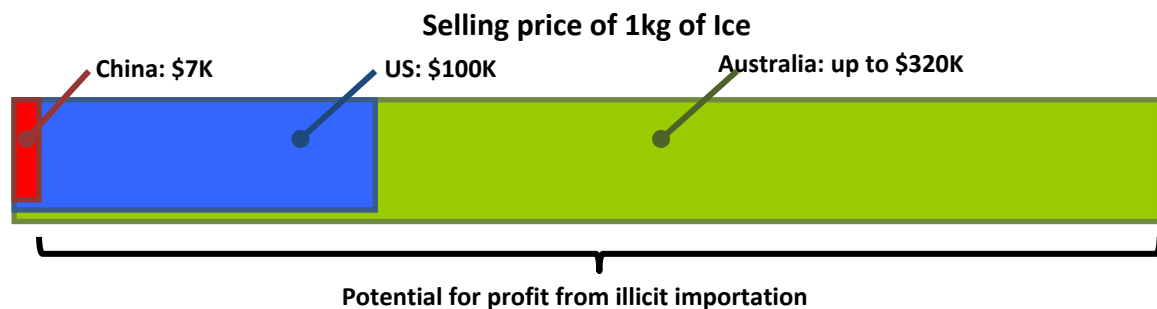
Corruption Enabled Border Crime

The proposals to strengthen the integrity arrangements of DIBP are occurring against a backdrop of changes in the operating and risk environments relating to the border.

The then Integrity Commissioner's final report into Operation Heritage/Marca at Sydney International Airport (2014) supported the Australian Border Force concept as an important integrity initiative to mitigate corruption risk. That investigation was one of the largest anti-corruption operations in Australia in recent years and to date has resulted in criminal proceedings against 26 people relating to the large-scale importation of narcotics worth more than \$46 million.

Other operations conducted by ACLEI and other criminal investigation agencies indicate that corruption enabled border crime continues to emerge as a specific risk to law enforcement and related agencies, including DIBP.

According to data from the Australian Crime Commission and United Nations Office on Drugs and Crime, Australia is among the world's most lucrative illicit drug markets. Cocaine and methamphetamine (Ice) are the two illicit drugs (by value) most commonly imported into Australia. As the following diagram shows, high domestic drug prices underwrite persistent attempts by organised crime groups to import illicit goods into Australia (Source: UNODC, World Drug Report 2013).



These high profits are enabling the growth in organisational capability of crime groups operating in Australia, including the increased involvement of transnational crime groups with the potential to use aggressive methods and actively seek out corruption opportunities.

Drug seizure data and domestic use indicators show that drug supply and use are at record high levels.¹ There are also indications of a generational softening in attitude to the use of so-called recreational (party) drugs and image enhancing substances, including steroids.²

ACLEI investigations³ continue to find officials across a number of agencies who use illicit drugs, illustrating the integrity challenges involved. Such conduct can or does bring these officials into the influence of organised crime groups.

¹ Australian Crime Commission (2014). *Illicit drug data report 2012–13*. Pages 27-40.

² Australian Commission for Law Enforcement Integrity (2013). *Annual Report of the Integrity Commissioner 2012–13*. Page 78.

³ For instance, Investigation Report 01-2014—*Operation Myrrh—An investigation into “private” illicit drug use by certain Australian Customs and Border Protection Service officers* and Investigation Report 03-2014—*A joint investigation into the conduct of an Australian Crime Commission employee who avoided a drug test*. Australian Commission for Law Enforcement Integrity, Canberra.

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4. Comments on the Bills

The measures proposed in the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 are a proportionate response to the increasing sophistication and capability of organised crime.

Passive integrity measures are not sufficient to address the emerging threat of corruption enabled border crime. Since the progressive implementation of enhanced integrity arrangements across the entire ACBPS from December 2013, ACLEI's operational experience is that such measures have had a deterrent effect on some individuals (whose conduct had been under investigation). In addition, the introduction of more channels for detection of misconduct (such as, drug testing and mandatory reporting) has been productive. Moreover, beyond the measures themselves, their introduction has contributed to a general rise in a professional standards culture and threat awareness that had been noticeably absent.

Accordingly, ACLEI welcomes the proposed arrangements, which will extend the existing ACBPS anti-corruption arrangements to the whole of DIBP.

Australian Border Force Bill (2015)

- *Alcohol and Drug Tests (Part 5)*

ACLEI supports the inclusion of this measure.

The supply of most illicit drugs in Australia is inherently connected to organised crime groups. Since 2013, in three separate investigations, ACLEI found staff of law enforcement agencies who were users of illicit drugs, such as cocaine and ecstasy. In most instances, these staff considered their drug use to be simply part of their private life and entirely separate from their professional obligations and responsibilities, despite their agency's roles in preventing the importation and distribution of illicit drugs.

Those investigated also failed to realise that, by using illicit drugs, they exposed themselves to considerable risk of compromise, including possible exposure to blackmail in return for keeping their drug use hidden. Several had also failed to recognise the potential value to organised crime groups of the information each held as a result of their official duties.

Accordingly, having regard to the sensitive functions undertaken by DIBP employees and the information the Department collects and safeguards for official purposes, broad-based drug testing of employees is an important corruption deterrence and detection measure.

- *Secrecy and Disclosure Provisions (Part 6)*

Corruption involves a trusted insider—a person who, for a perceived personal gain (or sometimes through duress), may pervert or misuse the tools, resources, privileges or discretions available to him or her. The main commodity sought by organised crime is information about law enforcement capability, methodology, personnel and systemic vulnerabilities. Accordingly, it is important that a strong legislative framework is in place to protect this asset.

Clause 43—which establishes an exemption from confidentiality provisions for the purposes of the LEIC Act—provides a lawful and unambiguous means for DIBP officers to provide relevant information direct to ACLEI without the need to seek internal approval. This is an important measure to ensure that whistle-blowers and other potential witnesses can be certain that their actions are authorised.

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- *Directions—administration and control (Clauses 26 and 55)*

Integrity measures, such as Mandatory Reporting and Organisational Suitability Assessments, help to mitigate the likelihood of staff members exercising inappropriate discretion about what to report.

To promote procedural fairness and accountability, ACLEI considers that it is appropriate and advisable for the Secretary and the ABF Commissioner to have a legislative basis for issuing binding directions relating to these integrity controls.

In relation to mandatory reporting [clauses 26(4),(8)-(10) and 55(5), (6),(10)-(12)], the measure will overcome any doubts concerning the legality of reporting (such as real or perceived concerns about secrecy, confidentiality or privacy) and create an enforceable obligation on Immigration and Border Protection workers to report serious misconduct by workers or criminal activity involving workers.

ACLEI understands that the mandatory reporting measure is not designed to allow DIBP investigators to coercively question employees whose integrity is in doubt (as the AFP might under section 40VE of the *Australian Federal Police Act 1979*, see Attachment A). Rather, this measure is intended to create a reinforcing culture of risk-awareness and mandatory reporting, to:

- ensure the indicators of corrupt conduct are identified as soon as possible, so that an appropriate early intervention may be made,
- enable individuals to acknowledge their own errors by disclosing information that would assist the Department to manage operational risks, while controlling the direct risk of self-incrimination as information and answers given by an individual are not admissible as evidence in any proceedings against the person who made them, and
- prevent systemic or entrenched corruption from developing.

Similarly, Organisational Suitability Assessments [clause 55(4)] provide a framework for the Department to assess suitability of personnel on an ongoing basis. To manage risks effectively, organisations need to know what the risks are—requiring staff members to be open and honest about conflicts of interest (whether real or perceived) and other concerns relating to themselves and the workplace. The assessments complement existing security regimes by enabling ongoing consideration of suitability for employment in a risk context, and assist to reduce opportunity for infiltration or corruption.

Customs and Other Legislation Amendment (Australian Border Force) Bill 2015

- *Extension of the Integrity Commissioner's jurisdiction (Schedule 6, re LEIC Act)*

This Bill amends the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to extend the jurisdiction of the Integrity Commissioner to the whole of the DIBP. ACLEI agrees with this measure, having regard to the risk that Immigration functions or information held by DIBP may be used corruptly to assist organised crime groups (in addition to those risks associated with the functions presently administered by ACBPS, and those additional risks that are likely to accrue from the formation of the ABF).

Frontline law enforcement staff members are usually the primary focus of corruption detection and investigation efforts. However, as law enforcement models have developed and diversified—including closer cooperation and information sharing between agencies that are primarily law enforcement in nature, and other government partners—opportunities for corrupt conduct have extended to a broader class of government employee, including those who may work in or with the DIBP.

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In addition, an emerging risk seen in a number of recent ACLEI investigations is that “back office” staff—administrative and other support staff who also have access to sensitive information—may be as vulnerable to compromise as operational staff. In addition, since they may be less prepared to respond to improper approaches, support staff may be more exposed to risk than was previously considered to be the case.

For these reasons—and noting that the Integrity Commissioner’s statutory focus is on serious and systemic corruption that occurs in a law enforcement context—ACLEI supports the proposed extension of jurisdiction to DIBP in its entirety. A whole-of-agency approach also reduces the potential for disputation or legal contest over the scope of ACLEI’s jurisdiction.

It is expected that resourcing implications for ACLEI relating to the extended jurisdiction will be considered through the normal budget processes of government.

- *Integrity testing (Schedule 6, re Crimes Act, etc.)*

The integrity testing regime established by the *Crimes Act 1914* presently applies only to the Australian Federal Police, the Australian Crime Commission and the Australian Customs and Border Protection Service. The Bill proposes to enable targeted integrity testing—when properly authorised—to be used in relation to DIBP employees more broadly.

Integrity testing is a specific method of investigating suspected corrupt conduct, whereby an officer is placed in an observed situation that is designed to test in a fair way whether he or she will respond in a manner that is illegal, unethical or otherwise in contravention of the required standard of integrity. The consequences of failing an integrity test can include disciplinary action, termination of employment or criminal charges.

The inclusion of this measure reflects and responds to ACLEI’s experience of the challenges involved in investigating corrupt conduct. It does so in a way which ensures accountability, protects the rights and reputations of individuals, and provides appropriate legal protection for officers who conduct authorised integrity tests.

Having regard to corruption enabled border crime risks, as well as the desirability of corruption investigation and deterrence measures being able to be applied across a jurisdiction, ACLEI supports the extension of integrity testing to DIBP.

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Attachment A

Australian Federal Police Act 1979

40VE Directions to AFP appointee

Investigator may give directions to AFP appointee

(1) The investigator may, for the purposes of the investigation or inquiry, direct an AFP appointee:

- (a) to give the investigator information (in the manner and form specified in the direction); or
- (b) to produce to the investigator a document, record or thing; or
- (c) to answer a question; or
- (d) to do anything else that is reasonably necessary for the purposes of obtaining evidence in relation to the investigation or inquiry.

Note: Failure to comply with the direction is an offence against subsection 40VH(1).

(2) A direction under subsection (1) has no effect unless the investigator:

- (a) states in the direction that the AFP appointee to whom the direction is given is being expressly directed under that subsection; and
- (b) specifies in the direction the substance of the subject matter of the investigation or inquiry; and
- (c) if it is practicable to do so—gives the direction in writing; and
- (d) if the direction is given in writing—gives the AFP appointee a copy of the direction.

Obligation to comply with direction

(3) If an AFP appointee is directed under subsection (1) to give information, produce a document, record or thing, answer a question or do something else for the purposes of obtaining evidence, the AFP appointee is not excused from complying with the direction:

- (a) on the ground that complying with the direction:
 - (i) would be contrary to the public interest; or
 - (ii) might make him or her liable to a penalty; or
- (b) on the ground that the information, the production of the document, record or thing, the answer to the question or the evidence obtained by doing that thing might tend to incriminate him or her; or
- (c) on any other ground.

Use to which information etc. may be put

(4) The information, the production of the document, record or thing, the answer to the question or the evidence obtained by doing that thing, is not admissible in evidence against the AFP appointee in any civil or criminal proceedings other than:

- (a) proceedings for an offence against subsection 40VH(1); or
- (b) proceedings in relation to termination action taken in relation to the AFP appointee; or
- (c) proceedings under the Safety, Rehabilitation and Compensation Act 1988; or
- (d) proceedings in tort that the AFP appointee institutes against the Commonwealth.

(5) Nothing in subsection (4) is taken to affect the admissibility in evidence, in any civil or criminal proceedings, of:

- (a) any information given by an AFP appointee to the investigator; or
- (b) the production of a document, record or thing by an AFP appointee to the investigator; or

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(c) an answer given by an AFP appointee to a question put to him or her by the investigator; or
(d) evidence obtained by an AFP appointee doing something for the purposes of obtaining evidence at the request of the investigator;
if the AFP appointee has not been expressly directed, under subsection (1), to give the information, to produce the document, record or thing, to answer the question or to do that thing.

(6) If a document, record or thing is produced to the investigator under a direction under subsection (1), the investigator may:

- (a) examine the document, record or other thing; and
- (b) retain possession of the document, record or other thing for such period as is necessary for the purposes of the investigation or inquiry.

If the investigator retains possession of a document, record or thing under paragraph (b) during a particular period, the investigator must allow a person who would be entitled to inspect the document, record or thing if it was not in the investigator's possession to inspect the document, record or thing at all reasonable times.

(7) If a document or record is produced to the investigator under a direction under subsection (1), the investigator may take extracts from, or a copy of, the document or record.

(8) For all the purposes of this Act, and the regulations in force under this Act, a direction given by the investigator under subsection (1) has effect as if it had been given by the Commissioner.

(9) An AFP appointee is not liable to any penalty (other than a penalty under this Act) merely because the appointee:

- (a) gives information; or
- (b) produces a document, record or thing; or
- (c) answers a question; or
- (d) does something else;

when directed to do so by the investigator under this section.

Direction is not a legislative instrument

(10) If a direction given by an investigator under subsection (1) is in writing, the direction is not a legislative instrument.