



Australian Government

**Australian Commission for
Law Enforcement Integrity**

Senate Standing Committee on Legal and Constitutional Affairs

*Inquiry into the Law Enforcement Integrity
Legislation Amendment Bill 2012*

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

17 October 2012

1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs. This submission relates to the Committee's inquiry into the Law Enforcement Integrity Legislation Amendment Bill 2012 (the LEILA Bill).

To assist the Committee, Part 2 of this submission provides background about ACLEI's role and responsibilities. Part 3 sets out the specific context for the LEILA Bill. ACLEI's comments about the Bill 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 subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission (ACC), the Australian Customs and Border Protection Service, the Australian Federal Police (AFP) 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.

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 Home Affairs, 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 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.

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;
- investigate the corruption issue jointly with another government agency;
- 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 another agency, such as a State integrity agency, the AFP, or another government agency, for investigation; or
- take no further action.

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

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement. 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:

- involve a suspected link between law enforcement and organised crime;
- 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.

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

Investigation powers

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;
 - 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 contempt¹ of ACLEI.

3. Context for the LEILA Bill

The specific measures proposed in the LEILA Bill aim to strengthen the current anti-corruption arrangements that apply in the Australian Government law enforcement environment. ACLEI supports the aim of the Bill, and considers the new arrangements to be timely and appropriate measures that are matched to current and emerging changes in the organised crime threat picture and, accordingly, to law enforcement corruption risk.

Organised crime threat picture

The 2011 ACC publication, *Organised Crime in Australia*, describes the increasingly global scope of organised crime and the threat posed by international organised crime to Australia, as follows:

The contemporary face of organised crime²

Opportunities for organised crime today are unprecedented—increased globalisation, escalating cross-border movement of people, goods and money, emerging international markets and rapidly developing and converging technologies provide a fertile operating environment for organised crime.

The picture of organised crime built up over the past decade reveals a dynamic, ever-evolving transnational phenomenon of immense size.

Organised crime is sophisticated, resilient, highly diversified and pervasive. Current patterns of organised crime are more complex now than at any point in history.

¹ See section 96B (Federal Court or Supreme Court to deal with contempt), *Law Enforcement Integrity Commissioner Act 2006*.

² *Organised Crime in Australia 2011*, Introduction, p 3.

Organised crime groups are entrepreneurial and unrestrained by legislation, borders, morality or technology. They are adaptable, innovative and fluid— infiltrating a wide range of industries and markets, well beyond areas generally considered vulnerable.

They are strategic and continually scan the marketplace for vulnerabilities, new opportunities and emerging technologies in order to make the greatest profit.

They are flexible about changing direction to achieve their goals. They adjust operations in response to law enforcement efforts to harden the environment. They collaborate for mutual benefit and can quickly disperse and regenerate in other markets if disrupted.

Organised crime operates within and alongside legitimate businesses, spanning multiple sectors to maximise return and minimise risk. Increasingly, organised crime uses logistics planning and aggressive marketing, buys in expertise and specialist facilitators and invests in research and development and risk mitigation strategies.

Complex networks which engage in illicit transactions stretch across continents to support activities that range from drug importation to identity fraud, cybercrime to high level offshore tax evasion, counterfeit goods to money laundering and even environmental crime.

To many, organised crime may seem like a distant threat, far removed from most people's lives. In reality, the social and economic harm that is caused through illicit drugs, financial crime and the associated violence and intimidation has a very real impact on the whole community.

One aspect of the threat described above, is the prospect that public officials will be compromised by organised criminal groups, or that agencies may be infiltrated by them, for the purpose of obtaining corrupt assistance.

The law enforcement corruption context

In 2008–09, the Integrity Commissioner oriented ACLEI's strategic focus to corruption issues related to organised crime. This decision reflected a change in the organised crime threat picture, which was articulated in the then Prime Minister's *National Security Statement to the Parliament* in December 2008 and in the 2009 *Commonwealth Organised Crime Strategic Framework*.

The Organised Crime Strategic Framework recognises that the corrupt compromise of public officials and infiltration of government agencies are tactics used by organised crime groups to establish, further or conceal illicit enterprises and activities. Due to the sensitivity of their roles, public officials who work in law enforcement contexts present a particular corruption risk.

To highlight this change in the threat picture, and to explain in an engaging way the emerging risk, the Integrity Commissioner uses the term '*the corruption handshake*' to describe the potential relationship between corrupt law enforcement officials and organised crime. The term encapsulates the idea that, in most cases, corrupt conduct will involve a dishonest transaction between two parties which, to bystanders, may be invisible or appear normal, as the following risks illustrate.

RISK ONE: Familiarity with law enforcement techniques (and 'inside knowledge' of their legal and technical limits) enables law enforcement officials to evade detection, and gives them confidence to act corruptly.

RISK TWO: Law enforcement officials provide information to criminal groups about law enforcement methods, to assist them to employ counter-measures and thereby evade detection.

RISK THREE: Law enforcement officials provide assistance to criminal groups to circumvent legitimate law enforcement activity.

Providing assistance of these types creates a commodity of value to organised crime, and places a corrupt official in the role of a facilitator of, or a participant in, crime and thereby frustrates or defeats legitimate law enforcement objectives.

For instance, criminal intelligence available to ACLEI indicates that organised crime places a high value on being able to readily access law enforcement ‘insiders’ who, by virtue of their positions or access to information, are able to facilitate the illicit importation of commodities such as border-controlled drugs and tobacco. Bribes in the order of 50% to 300% of a law enforcement official’s yearly income are alleged to have been offered to facilitate an illicit importation.

Taskforce Natio—an ACLEI-led operation with the AFP, Customs and Border Protection and other agencies—presently is investigating the influence of organised crime and associated corruption risk in border environments.

‘Match measures to risks’

ACLEI’s jurisdiction and resourcing structure is founded on the concept of ‘matching measures to risks’. Accordingly, since its commencement in 2007, ACLEI has developed in capacity, capability and scope to respond to emerging threats to integrity in Australian Government law enforcement environments. Some of these developments include:

- additional resources provided by Government in each year since ACLEI’s commencement (from a budget of \$2 million on 2006–07 to \$5.1 million in 2011–12);
- in January 2011, the extension of the Integrity Commissioner’s jurisdiction to include the Australian Customs and Border Protection Service; and
- strengthening the Integrity Commissioner’s hearing power, so that a person who engages in contemptuous conduct may be dealt with by the Federal Court of Australia or a Supreme Court of a State.

These measures—and the additional anti-corruption arrangements in the LEILA Bill—recognise the serious effects of corrupt conduct and infiltration (if unchecked), and the need to examine novel ways of combating organised crime and the risk of corruption.

4. Comments on the LEILA Bill

A hallmark of corruption is that it tends to occur in secret between consenting parties. The integrity arrangements of a high corruption-risk agency need to take account of the difficulties of investigating corrupt conduct, including the challenge of collecting evidence.

Accordingly, through a mixture of detection, deterrence and investigation measures, the targeted integrity arrangements in the LEILA Bill are intended to assist high-corruption risk agencies to strengthen their resistance to corruption.

Schedule 1 – Integrity testing and expansion of coverage by ACLEI

Part 1—Integrity testing

The LEILA Bill introduces an integrity testing regime for the ACC, the AFP, and Customs and Border Protection. Each of these agencies is already within the jurisdiction of the Integrity Commissioner, with Customs having been added by regulation, from 1 January 2011, and by amendment³ of the LEIC Act, from 6 December 2011.

The Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity considered in 2011 whether an integrity testing regime would be suited to the Commonwealth law enforcement environment, and concluded that it was (subject to certain provisos to ensure fairness and accountability). As the Explanatory Memorandum to the LEILA Bill explains, the Parliamentary Joint Committee's report⁴ is the basis for the proposed legislation.

Integrity testing offers an alternative investigation path that is suited to particular circumstances. For instance, when information relates to corrupt conduct that is alleged to have occurred in the past, and for which it may be impractical to collect evidence to a sufficient standard—perhaps because of the passage of time, a lack of contemporaneous corroborative evidence, or the need to protect the identity of a witness—integrity testing offers a means by which a person's propensity to act inappropriately may be put to the test in a fair situation that is covertly observed.

An individual's decision to act corruptly at some point involves an evaluation of risk, which ACLEI has called the "detection risk calculation".⁵ An expected advantage of an integrity testing regime is the deterrence effect created when there is sufficient doubt in the mind of an individual about whether a corrupt transaction may be simulated or is otherwise being observed.

To further strengthen this deterrence effect, it is desirable also to alter the parameters that would otherwise apply to police investigation powers. Accordingly, one purpose of the LEILA Bill is to lower the threshold for the use of the controlled operations methodology when it is used in an integrity testing context, and to broaden the class of uses to which product from telecommunications interception and surveillance devices may lawfully be put. These measures aim to redress the imbalance between corruption incentives (evidenced, for example, by the size of bribes) and the present corruption-deterrence regime.

In summary, this part of the Bill 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.

Part 2—Expansion of coverage by ACLEI

Strengthening the integrity arrangements of one agency introduces the risk that less well-protected agencies may become targets from infiltration or corrupt compromise tactics from organised crime groups. ACLEI refers to this risk as 'the displacement risk'.

³ See *Crimes Legislation Amendment Act (No. 2) 2012*

⁴ Tabled in the House of Representatives on 21 November 2011.

⁵ See Figure 4—Corruption precursors, indicators and interventions, *Annual Report of the Integrity Commissioner 2010–11*, page 71.

The LEILA Bill seeks to address this displacement risk by bringing three additional agencies (in whole or in part) into the LEIC Act jurisdiction. The agencies nominated in the LEILA Bill are all agencies that work in close cooperation with the current LEIC Act agencies in high-corruption risk environments, or that hold or have access to commodities that could facilitate organised crime, such as sensitive law enforcement information. These agencies are:

- the Australian Transaction Reports and Analysis Centre (AUSTRAC), a statutory agency which is responsible for the financial transactions reporting needed to monitor activities such as money laundering and terrorist financing;
- the CRIMTRAC Agency, which is created as an executive agency under the *Public Service Act 1999* and that is responsible for holding and sharing information for law enforcement purposes; and
- the department responsible for the *Primary Industries Levies and Charges Collection Act 1991*⁶—presently the Department of Agriculture, Fisheries and Forestry (DAFF).

ACLEI has recent experience—namely, since 2011, Customs and Border Protection—in dealing with an agency coming into its jurisdiction and of having to reach a state of knowledge about the new agency's operations and risk profile. That experience will enable ACLEI to develop appropriate relations and operating arrangements ahead of the proposed commencement of the extended jurisdiction on 1 July 2013. The Minister for Home Affairs and the Minister for Justice, the Hon. Jason Clare MP, has announced⁷ that additional resources will be provided to implement the new measure from that date.

It may, at some future stage, be appropriate for the Government and Parliament to consider the extension of the proposed integrity testing regime to these three additional agencies. It is ACLEI's preference that such a step not occur until experience with integrity testing develops in existing LEIC Act agencies, and more is known about corruption risks in the newer agencies.

Part 3—Related amendments

ACLEI notes these amendments, including those that provide for surveillance devices and telecommunications and interception in integrity testing operations. ACLEI also notes that the existing provisions for the issue of authorisations and warrants, and the oversight of these activities by the Commonwealth Ombudsman, will apply when they are used also in an integrity testing context.

Schedule 2 – Other amendments relating to the Australian Customs and Border Protection Service

Confidence in integrity is an important intangible in government administration and law enforcement. Customs and Border Protection has an important role in protecting Australia's people, economy and environment. Accordingly, strengthening the agency's integrity arrangements will provide a strategic basis to enhance inter-agency and international cooperation in coming years as the challenges or regulation, enforcing laws and protecting Australia's border becomes a more complex task.

⁶ The second reading speech suggests that this jurisdiction will be limited, under a regulation, to certain staff involved in border protection functions, namely the Biosecurity function of the Department.

⁷ Minister for Home Affairs and Justice, Media Release, 19 September 2012, www.ministerhomeaffairs.gov.au/Mediarereleases/Pages/2012/Third%20Quarter/19-September-2012-New-laws-to-combat-corruption.aspx.

During 2012, ACLEI provided strategic direction and technical assistance to a Customs and Border Protection internal review of its integrity arrangements and anti-corruption strategies. The measures in Schedule 2 of the LEILA Bill give effect to many of the priority areas identified in the review that require a legislative basis. In particular, these amendments reflect that agency's current and planned engagement in law enforcement-related activities, as well as recent changes in the organised crime threat picture (that are referred to in Part 3 of ACLEI's submission).

These measures will bring Customs and Border Protection's anti-corruption arrangements into closer alignment with those of the Australian Crime Commission and the Australian Federal Police, and contribute to the 'common integrity platform' which has the LEIC Act as its centre. Accordingly, ACLEI welcomes the proposed insertion into the *Customs Administration Act 1985* of measures that are designed to strengthen the existing anti-corruption arrangements of the Australian Customs and Border Protection Service.

Termination of employment for reasons of serious misconduct – Declaration for serious misconduct

As noted previously, an anti-corruption strategy should remain matched to the risks it is intended to mitigate. Creating a values-based culture is an essential first component of an effective anti-corruption strategy. In the law enforcement context, inculcating professional standards—a loyalty and strong adherence to professionalism—is an important strategy aimed at establishing a particular kind of workplace culture that resists corruption.

One role of an agency's employment framework—which includes arrangements for dismissal—is to reinforce and support an agency's integrity strategy. The 'Declaration power' in the LEILA Bill will provide a specific legislative basis for the Chief Executive Officer of Customs and Border Protection to disrupt corruption by dismissing a staff member, when serious misconduct or corrupt conduct is established to a relevant level of satisfaction, and issuing a declaration to that effect.

The Declaration power will also align with other measures in the LEILA Bill (namely integrity testing, drug testing and mandatory reporting) and with the existing LEIC Act powers for the Integrity Commissioner to make a finding⁸ of corrupt conduct in relation to a Customs and Border Protection staff member and to disseminate evidence⁹ relating to a breach of duty or misconduct.

Drug and alcohol testing

The use by an employee of illicit drugs (including border controlled substances, such as steroids) would bring him or her in to contact with criminals who supply or distribute these substances. An employee who uses unlawful or illegally-imported substances is compromised by the action and any witnesses to it, and is therefore vulnerable to corrupt influence. Accordingly, broad-based drug testing of employees is an important corruption deterrence and risk-awareness measure.

CEO's Orders and Mandatory reporting

ACLEI considers that it is appropriate and advisable for the Chief Executive Officer of Customs and Border Protection to have a legislative basis for issuing binding orders relating to integrity.

⁸ Section 54 of the LEIC Act.

⁹ Section 146 of the LEIC Act.

In relation to mandatory reporting, the measure will overcome any doubts (such as real or imagined concerns about secrecy, confidentiality or privacy) about the legality of reporting, and create an enforceable obligation on staff members to report suspected misconduct or corrupt conduct. This arrangement is intended to create a reinforcing culture of risk-awareness and professional reporting, which is designed to:

- ensure the indicators of corrupt conduct are identified as soon as possible, so that an appropriate early intervention may be made; and
- prevent systemic or entrenched corruption from developing.

If implemented, ACLEI intends to work with Customs and Border Protection to develop a professional reporting support network, such as exists in the AFP to provide multiple pathways and assistance to employees to meet mandatory professional reporting obligations.