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Australian Commission for
Law Enforcement Integrity

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**Inquiry into whistleblowing
protections within the Australian
Government public sector**

**Submission by the
Australian Commission for Law
Enforcement Integrity (ACLEI)
to the House Standing
Committee on Legal and
Constitutional Affairs**

August 2008

1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make to the House Standing Committee on Legal and Constitutional Affairs (the Committee) a submission regarding the *'Inquiry into whistleblowing protections within the Australian Government public sector'*.

The submission is designed to assist the Committee by providing:

- general information about how ACLEI operates (Part 2);
- specific observations about 'whistleblowing' in the law enforcement corruption context (Part 3); and
- a summary of issues the Committee might consider when developing a whistleblower protection model, having regard to the Inquiry's terms of reference (Part 4).

ACLEI would be pleased to make further submissions during the course of the Inquiry, should the Committee wish.

2. Responsibilities and powers of ACLEI

The Role of the Integrity Commissioner

The *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) commenced on 30 December 2006. The LEIC Act establishes the statutory office of Integrity Commissioner. The Integrity Commissioner is supported by an independent agency, the Australian Commission for Law Enforcement Integrity (ACLEI).

The Integrity Commissioner's role is to:

- detect, investigate and prevent corruption in law enforcement agencies;
- maintain and improve the integrity of staff members of law enforcement agencies; and
- collect and process intelligence on corruption in law enforcement.

Presently, those subject to the scrutiny of the Integrity Commissioner under the LEIC Act are staff members of the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the former National Crime Authority (NCA). Other agencies with a law enforcement function may be added by regulation (s 5, LEIC Act, definition of *law enforcement agency*).

Receiving corruption information

One important feature of the LEIC Act is that it provides for the mandatory notification, by the relevant law enforcement agency head to the Integrity Commissioner, of information and allegations concerning corruption, irrespective of the source of that information (s 19).

In this way, the LEIC Act establishes an arrangement whereby the Integrity Commissioner and the agency heads, prevent and deal with corruption jointly and cooperatively. The arrangement recognises both the considerable work of the ACC and AFP to introduce internal corruption controls (including detection and deterrence

mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staffs.

Also, the LEIC Act provides for the Minister to refer corruption issues to the Integrity Commissioner (s 18), as well as for any other person, including members of the public or other government agencies, to provide information about corruption (s 23).

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

Criteria for handling matters

The LEIC Act, at s 27, sets out the criteria to which the Integrity Commissioner must have regard in determining how to deal with a corruption issue, including whether to take no further action. Section 29(9) sets out additional criteria, in terms similar to s 27, that apply where a corruption issue relates to the conduct of a person seconded to the AFP or ACC from another government agency, including from a State or Territory police force.

While the LEIC Act establishes that the Integrity Commissioner's role is to decide how a matter will be handled, sections 27 and 29(9) make it plain that there are several issues to be balanced, among them:

- the need to ensure a matter is fully investigated;
- the relative resources of the agencies that could investigate the matter;
- the significance of a matter; and
- the desirability of ensuring that the heads of law enforcement agencies take responsibility for managing corruption risks in their agencies.

The Integrity Commissioner is to give priority to dealing with serious corruption and systemic corruption (s 16).

These criteria highlight the principle that agency heads should take primary responsibility for integrity matters in their agency. These criteria highlight also that an oversight agency, because of size and resourcing, must deploy its resources strategically and carefully.

In what ways may ACLEI deal with corruption issues?

Under sections 26 and 29(6), the Integrity Commissioner can decide how a corruption issue may be dealt with, that is:

- as an ACLEI investigation;
- by referring matters to another agency (such as the AFP or a State integrity agency or police force, as appropriate), with the option to oversee the agency's investigation; or
- by a joint investigation with another government agency, or with an integrity agency of a State or Territory.

What are ACLEI's investigative powers?

A challenge that faces ACLEI is that those law enforcement officers subject to the inquiries of the Integrity Commissioner are themselves well-versed in law enforcement methodologies, and may be skilled at countering them to seek to avoid scrutiny.

ACLEI's key investigative powers are:

- coercive information-gathering, such as in response to Notices to produce evidence or information, or under oath or affirmation in response to a summons (ss 75, 76);
- telecommunications interception;
- electronic and physical surveillance;
- controlled operations;
- assumed identities;
- search warrants (Part 9, Division 4);
- right of entry onto law enforcement premises and associated seizure powers (ss 105, 106)
- arrest (s 139);
- scrutiny of financial transactions; and
- access to law enforcement and other databases for law enforcement purposes.

ACLEI may also collect intelligence about corruption in support of its functions.

What can be done with evidence?

Where the Integrity Commissioner discovers evidence of an offence, a liability to civil penalty, or evidence that would be admissible in a proceeding under the *Proceeds of Crime Act 2002* (or a State or Territory equivalent), the assembled evidence must be given to the AFP or to an agency with the power to conduct the relevant prosecution or confiscation proceedings (ss 142, 143).

With limited exceptions, information compulsorily provided by a witness in response to a summons (s 83) or a Notice to produce (ss 75, 76) is inadmissible in evidence against the person in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty (ss 96 and 80).

Evidence about a breach of duty or misconduct by a staff member that might justify terminating the employment of a law enforcement officer, or initiating disciplinary proceedings against them, must be provided to the head of the relevant law enforcement agency (s 146). This provision extends also to secondees, and allows the Integrity Commissioner to provide the information to a secondee's home agency. The s 96 'use immunity' does not apply to disciplinary proceedings.

What are the Integrity Commissioner's other functions?

The Integrity Commissioner has a role in reviewing the structural and governance arrangements of law enforcement agencies, as well as of the laws of the Commonwealth, that might contribute to corrupt practices, or prevent their early detection.

For example, as part of the annual reporting process, the Integrity Commissioner must describe the nature and scope of corruption in the agencies oversighted, as well as any patterns and trends (s 201(2)(c)).

The Integrity Commissioner may also include in the annual report any recommendations for changes to the laws of the Commonwealth, or to the administrative practices of government agencies (s 201(2)(d)).

3. Whistleblowing as a source of corruption information for ACLEI

Mandatory reporting to ACLEI

One of the strengths of the LEIC Act is the responsibility placed on the heads of law enforcement agencies to notify the Integrity Commissioner of any allegation, or information, that raises a corruption issue in their own agency (see s 19, LEIC Act). The Integrity Commissioner's role is to independently assess each issue, and to determine how each will be handled.

In this way, the heads of agency retain primary responsibility for maintaining the integrity of their own agency, rather than creating a sole or disproportionate reliance on the Integrity Commissioner. This arrangement provides a strong incentive for agency heads to be proactive in implementing corruption and misconduct controls.

The arrangement recognises also that much of the high-value information about corruption is likely to come from within each agency.

The AFP's whistleblower program is a good example of how information about corruption and misconduct can be uncovered. The AFP's scheme, the 'Confidant Network', is used below to illustrate key points.

AFP Confidant Network

The AFP is an agency at the forefront of most aspects of internal corruption control, and resources its Professional Standards portfolio, charged with the internal investigation of misconduct allegations, with over \$11m annually.¹

While the AFP gathers information about possible corruption and misconduct from a variety of detection methods, one useful source is the AFP's Confidant Network – a type of 'professional reporting', 'whistle-blower' or 'internal witness' program.

The AFP was the first Australian Government agency to initiate an internal whistleblower scheme, over 15 years ago. It was introduced following a recommendation of the Commonwealth Ombudsman, and has since been a worthy complement to the AFP's other efforts to detect corruption and misconduct.

With the commencement of the LEIC Act in December 2006, information or allegations about corruption that come through the Confidant Network are now formally scrutinised by an external agency, namely ACLEI, pursuant to s 19.

Professional reporting schemes

'Professional reporting' or 'internal witness' programs now exist in several law enforcement jurisdictions in various forms and are becoming a feature of the modern anti-corruption landscape.

Critically, as well as being an actual source of information about corruption and other misconduct, professional reporting schemes introduce an additional deterrent to would-be offenders because the chance of detection of misconduct is increased.

These schemes aim to counter one of the negative aspects of police culture, namely the 'thin blue line' or 'blue wall of silence', which is a cultural or social norm that acts to

¹ Evidence of AFP Deputy Commissioner Lawler, *Examination of the Annual Report of the Integrity Commissioner 2006-07*, 10 April 2008, Hansard p 20.

prohibit colleagues implicating one another in integrity investigations. The phenomenon is said to be in most danger of arising when “nothing is more important than the unswerving loyalty of officers to one another”.² Professional reporting programs aim to supplant a culture of loyalty to individuals, and replace it with a sense of allegiance to a superior set of values that draw on the ‘professionalisation’ of policing and that include accountability and integrity.

Developing cultures of integrity and accountability

The AFP’s professional reporting scheme might not be as successful were it not also integrated with other integrity strategies. The AFP’s corporate values make a feature of integrity and accountability, and this ‘ethical message’ pervades AFP training and development.

The AFP Confidant Network is staffed by experienced colleagues and senior mentors, and provides a reporting avenue that also offers discretion and support (and sometimes anonymity), as well as ethical advice. One of the intentions of the program’s design is to build a culture of accountability that is ‘pro-disclosure’ and which seeks to extinguish any stigma associated with reporting.

In this way, having an internal whistleblower scheme is not itself ‘the outcome’ or ‘policy output’, but is instead a tangible part of the agency’s integrated ethical framework. Building the confidence of the public and government in the law enforcement agency is the policy output, and is achieved through fostering of an ‘integrity and accountability culture’.

Some design features

Notably, AFP appointees are under a legal obligation to report suspected misconduct.³

The Confidant Network provides a secure avenue for individuals to discuss their obligations according to their circumstances; to explore what support might be available were a disclosure to be made; and to consider their options, such as anonymity or protections against possible reprisal.

The Confidant Network is able to offer a range of advice and support, including conduct matters, ethical dilemmas, human resources, and supervision issues. This framework recognises the complexity and inter-related nature of matters that can be the subject of a disclosure.

The AFP aims also to ensure the fair and equitable treatment of those members who come under a conduct investigation as a result of a professional report made by another person, within the bounds of protecting the source of a professional report.

These efforts to imbue the Confidant Network and disciplinary systems with a reputation for being trustworthy and practical has recognised the motives, concerns and hesitations of those who might make a professional report when it is otherwise confronting to do so. Notably, these same factors are also potential limits to the success of internal whistleblower schemes, were a whistleblower scheme or disciplinary system not held in high regard.

² Mollen Commission (1994) *The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department: Commission Report*. City of New York, New York. Pages 51-52.

³ AFP Commissioner’s Order 2, made pursuant to s 38 of the *Australian Federal Police Act 1979*.

As a general comment, any organisation's conception of ethical practice can vary over time, and from one organisation to another. Successive external reviews of agency practices have borne out this notion: see for example the Wood Royal Commission into the New South Wales Police Service (1997), the Commonwealth Ombudsman's Inquiry into the removal of Vivian Alvarez (2005),⁴ and the Inquiry into the Australian Wheat Board in relation to the UN Oil-for-Food Programme (2006),⁵ each of which revealed weaknesses in the ethical frameworks of the respective organisations, and which manifested in different forms of misconduct and maladministration.

Therefore, it might be noted that agency internal reporting schemes, in the absence of oversight and monitoring, carry the risk of entrenching the cultural short-comings of an organisation, as well as its strengths.

Controlling risks

While there are valuable lessons to be drawn from the AFP's experience with the design and administration of professional reporting systems, it might also be noted that the Confidant Network is not a panacea for all of the challenges that attend corruption control and the building of an ethics-based culture.

The AFP's solution for dealing with professional reporting may not be appropriate for every agency. In fact, it would be appropriate for each agency to design a system that addresses, and is a proportionate response to, its specific risks.

ACLEI's role in external professional reporting

An important enhancement to the internal professional reporting mechanisms of the AFP and ACC has been the establishment of ACLEI with powers to independently assess and investigate corruption information.

Where the Integrity Commissioner does not investigate, but refers a corruption issue back to an agency for it to investigate, the Integrity Commissioner is entitled to retain an interest in the investigation's progress and outcomes (Part 7, Division 3, LEIC Act). This arrangement would enable ACLEI to examine measures being taken to protect any internal witnesses.

Upon receiving a final report, the Integrity Commissioner may make recommendations to the head of the agency, for example to investigate further, to initiate disciplinary action, or to commence criminal charges against a person. Again, this arrangement would enable ACLEI to examine measures being taken to protect any internal witnesses.

Where the Integrity Commissioner is not satisfied with the actions an agency head proposes to take in response to such recommendations, the Integrity Commissioner may set out his view, and reasons for this view, to the Minister. The Integrity Commissioner may also provide a copy to the President of the Senate and the Speaker of the House of Representatives for presentation to each House of the Parliament.

The LEIC Act, and the AFP and ACC Acts, include other provisions that might give confidence to would-be whistleblowers, as follows:

⁴ Report no 3/2005 – *Inquiry into the Circumstances of the Vivian Alvarez Matter*, a Report under the Ombudsman Act 1976 by the Commonwealth Ombudsman, Prof. John McMillan, of an inquiry undertaken by Mr Neil Comrie AO APM.

⁵ *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, the Honourable Terrence Cole AO RFD QC, Commissioner. November 2006.

- ▶ Under s 23 of the LEIC Act, ACLEI may receive allegations or information about possible corruption from any source, including 'whistleblowers' from within the AFP, the ACC, and the former NCA.
- ▶ Subsections 51(2) and (4) of the *Australian Crime Commission Act 2002*, and s 60A(2) of the *Australian Federal Police Act 1979*, permit a serving or former law enforcement officer lawfully to provide to the Integrity Commissioner information and material related to their employment that might disclose a corruption issue. Other mechanisms are available to staff of the former National Crime Authority who may wish to raise issues with the Integrity Commissioner.
- ▶ Section 222(5) of the LEIC Act establishes an immunity against civil proceedings in respect of any information, document or evidence given to the Integrity Commissioner by a law enforcement officer, provided that these were provided in good faith.
- ▶ Sections 90, 91 and 92 of the LEIC Act provide for the Integrity Commissioner to direct that particular evidence and information about a hearing, including the fact that a person has given or is about to give evidence at a hearing, be kept confidential. Penalties of up to 12 months imprisonment can apply if a person is found guilty of contravening a confidentiality direction.
- ▶ Section 220 of the LEIC Act establishes an offence of victimisation in respect of a person who refers a matter, gives information, or produces a document to the Integrity Commissioner.
- ▶ Finally, section 104A provides for the Integrity Commissioner to make such arrangements as are necessary to protect the safety of witnesses and intended witnesses (and of others whose safety may be prejudiced as the result of another person giving evidence), and to protect them from intimidation and harassment.

Currently, ACLEI assists in modest ways with the training of AFP Confidants. It is plain that the integrity system would be strengthened were ACLEI able to promote its 'whistleblower' function more widely.

4. Issues for consideration

Complainants or witnesses?

Matters brought forward by 'whistleblowers' vary greatly. The information provided may be accurate or may be based in a misunderstanding. It may disclose minor misconduct, or may indicate serious or systemic corruption. The information may be disclosed for reasons of public interest, a clearing of the conscience, for other reasons of self-interest, or may even be maliciously brought.

As a consequence, the legislative and administrative framework needs to provide the flexibility for external agencies to investigate claims according to the circumstances. In ACLEI's case, investigations centre on issues and information, rather than on the person who has provided information to the Integrity Commissioner.

The LEIC Act is not premised on the idea that a person who provides information about corruption to ACLEI is a complainant. The term 'complaint' implies that a person wishes to achieve a remedy for a wrong, and usually achieve some form of personal restitution.

While a 'whistleblower' might raise an issue with ACLEI and desire restitution, ACLEI does not pursue matters to achieve an outcome *for* the complainant. Rather, ACLEI investigates *issues* (or causes them to be investigated by other agencies) where there is a broader public interest to be served by exposing and preventing corruption.

This distinction has a fundamental effect on the construction of legislation. Table One, overleaf, is based on the Integrity Commissioner's 2006-07 Annual Report (page 18) and illustrates this distinction.

Consequently, the management of a person who has brought information forward to ACLEI may be handled separately to the investigation process. This approach seeks to ensure that investigations are not compromised and remain issues-driven, and that the expectations, behaviour and safety of a person who has provided information to ACLEI are managed sensitively and appropriately.

Noting these tensions, the Committee may wish to consider recommending a flexible approach to any obligations placed on an external investigation agency to keep 'whistleblowers' informed of the progress of investigations, and of their rights to seek judicial review of decisions to investigate or not investigate.

Table One: Differences between complaint-handling and anti-corruption agencies

	Complaint Handling Body (eg Ombudsman)	Anti-Corruption Body (eg ACLEI)
Focus	<ul style="list-style-type: none"> Addressing maladministration and customer service standards Dealing with complaints from the public 	<ul style="list-style-type: none"> Exposing and dealing with serious corruption Developing corruption resistance strategies with agencies
Policy rationale	<ul style="list-style-type: none"> Ensuring administrative action by government agencies is fair and accountable Correcting administrative deficiencies quickly and efficiently 	<ul style="list-style-type: none"> Providing independent reassurance that staff of law enforcement agencies act with integrity Effective deterrent to corrupt behaviour
Sources of information	<ul style="list-style-type: none"> Complainants (primarily) 	<ul style="list-style-type: none"> Detection by home agency Intelligence from various sources, including: <ul style="list-style-type: none"> Public interest disclosures ('whistle-blowers') Data-mining Persons in custody Members of the public
Accessibility to the public	<ul style="list-style-type: none"> Thousands of approaches annually Complainants have certain legal rights to be informed of action taken Regular communication with complainants, including details of final decisions/reports 	<ul style="list-style-type: none"> Few 'complaints' Any 'complaints' received treated as a source of information. Provision of progress reports and investigation outcomes to people providing information is decided on a case-by-case basis
Openness	<ul style="list-style-type: none"> Relative openness with complainants Prior notification of persons the subject of investigation (procedural fairness) 	<ul style="list-style-type: none"> Strict security No prior notification given to persons the subject of investigation
Investigative approach	<ul style="list-style-type: none"> Generally open, face-to-face investigation techniques Informal procedures Coercive investigation powers available where necessary Hearings in private with public reports on public interest matters 	<ul style="list-style-type: none"> Formal hearing procedures Use of informants Hearings in public where an adversarial approach is warranted or there is another public interest coercive information-gathering powers intrusive investigation methodologies, such as surveillance and telephone interception
Other modes to achieve objectives	<ul style="list-style-type: none"> 'Own-motion' investigation into systemic issues in administration 	<ul style="list-style-type: none"> Integrity testing Controlled operations Reviews of design and effectiveness of home agency anti-corruption programs
Reporting	<ul style="list-style-type: none"> To agency and complainant Capacity to make a report public 	<ul style="list-style-type: none"> To agency and Minister (and, where warranted or required, Parliament) Capacity to advise 'complainant' Capacity to make a report public
Resources	<ul style="list-style-type: none"> Relatively inexpensive per complaint 	<ul style="list-style-type: none"> Resource intensive

Who can make a professional report? (Terms of Reference 1)

As noted above, the secrecy provisions of the AFP and ACC Acts do not restrict former law enforcement officers, including former secondees to those agencies, from lawfully providing information to the Integrity Commissioner and to ACLEI. Mechanisms are available under the former National Crime Authority to allow disclosures about corruption to be made to ACLEI. These arrangements recognise that a former employee may feel more able to report corruption, than when encumbered by the employment relationship and attendant factors.

While the term 'whistleblowing' is sometimes narrowly construed to mean 'current employees only' (because of the policy link that would seek to avoid reprisals) it is ACLEI's view that there should be pathways for disclosures to be made by former employees (or any others who might otherwise be caught by statutory secrecy provisions).

This arrangement would enable a statutory exemption from secrecy provisions when a disclosure is legitimately made to an external agency that is authorised to receive it.

What types of disclosures warrant protection? (Terms of Reference 2 & 3)

It is well established in law enforcement that informants (some of whom could be classed 'whistleblowers') may be motivated by malice or self-interest, rather than concern for the public interest.

Perhaps with this in mind, the exemptions from the secrecy provisions of the ACC and AFP Acts are absolute in their terms. Therefore, it is lawful for the information to be provided to ACLEI. However, it remains an offence to knowingly provide false or misleading information to the Integrity Commissioner (s 137.1 and 137.2 of the Criminal Code).

This arrangement preserves the distinction between disclosing information that the provider of information reasonably believes to be true, even if motivated by a degree of malice or self-interest, and knowingly providing false or misleading information. To assist ACLEI to make this distinction, the Integrity Commissioner may refuse to investigate an allegation until it is made in writing (s 23(3) and (4)). However, an assessment is routinely made of all information provided to ACLEI to determine its fitness for investigation in any case.

As a further safeguard against malicious reports, the Integrity Commissioner may then, upon assessment, conclude that the information does not disclose corrupt conduct, or should not be investigated further for other reasons, including that it is not susceptible of investigation, or is trivial or vexatious.

Under this regime, there are no complicated procedures for a person to comply with in order to provide information to the Integrity Commissioner. The exemption from the AFP and ACC secrecy provisions is available wherever a person acts reasonably and in good faith. There is no threshold for protection or any other qualification.

This arrangement enables 'whistleblowers' to report information to ACLEI, even where they might be hesitant about the veracity of the information they are passing on. Provided the person is upfront about their hesitations, and the report has not been maliciously made, the report would meet the 'good faith' test, and trigger also the immunity against civil proceedings provided by s 222(5) of the LEIC Act.

***An external agency to receive whistleblower complaints?
(Terms of Reference 5(a))***

It would be consistent with the LEIC Act model for there to be both internal and external agency avenues to receive disclosures. The potential for external review is a powerful incentive for whistleblower reports to be well-handled by respondent agencies.

Currently, ACLEI shares jurisdiction with the Commonwealth Ombudsman in respect of the AFP and ACC. All complaints about these agencies, other than those that relate to corruption, are investigated or reviewed by the Ombudsman. Where the Ombudsman becomes aware of a corruption issue, the matter is referred to the Integrity Commissioner (ss 6(16) and 6(17) of the *Ombudsman Act 1976*). A complementary provision in the LEIC Act (at s 23(5)) confers standing to the person who originally provided the information to the Ombudsman, as if the information had been provided to the Integrity Commissioner in the first instance.

As the LEIC Act essentially provides an external whistleblower scheme in respect of AFP, ACC and former NCA corruption matters, any new legislation should not displace these existing arrangements.

Were the Ombudsman to become the repository of powers as the external whistleblower clearing house, ACLEI is confident that any issues of duplication and confusion could be minimised.

Were the Ombudsman not selected to be the repository, or if more than one agency were selected or a new one created, ACLEI would need to establish relations with that agency (or agencies) to seek to ensure that the carriage of corruption assessments remains with ACLEI, given the sensitive and specialised nature of corruption investigations.

Therefore, it may be prudent to enact corruption referral powers similar to ss 6(16) and 6(17) of the Ombudsman Act for any agency that might be prescribed as a recipient of disclosures.

***Obligations of public sector agencies for their own internal schemes
(Terms of Reference 5(b))***

In all but serious cases, or where there is reason to doubt the ability or willingness of an agency to handle a disclosure with appropriate sensitivity and without reprisal, it would be reasonable to expect that a matter should be handled internally before an external agency acts on a disclosure.

Because some agencies might have a less pressing need than others to establish schemes due to differences in their corruption and fraud-risk profiles, enabling a variety of agency-specific solutions would be a desirable outcome.

Prescribing minimum standards would be a useful initiative. These standards might include:

- ▶ an obligation to protect the identity of a whistleblower as far as is practical in the circumstances,
- ▶ prompt investigation,
- ▶ compliance with the Australian Government Investigation Standards (AGIS),
- ▶ provision of appropriate feedback to the whistleblower, even if this is reassurance that a matter is progressing,

- ▶ measures to address any alleged victimisation (eg report promptly to a 'whistleblower agency' or to the AFP),
- ▶ reporting operation of internal scheme to 'whistleblower agency',
- ▶ guidance to assist agencies to:
 - deal with suspected malicious or vexatious whistleblowers,
 - refer appropriate cases for consideration of prosecution and
 - manage employees with psychological difficulties in a sensitive way.

***Training, education, scheme promotion, monitoring and research
(Terms of Reference 5(c))***

ACLEI considers that it would be desirable for one agency to lead training, education, scheme promotion, monitoring and research efforts, with collaboration and co-badging from agencies that would have a statutory role in receiving whistleblower disclosures (such as the Ombudsman, the Auditor-General, the Inspector-General of Intelligence and Security, and the Integrity Commissioner). The Australian Federal Police might also have a role in criminal and corruption matters involving the Australian Government.

This lead role could also involve assisting public sector agencies to establish model procedures that are a proportionate response to each agency's risk profile, where schemes do not already exist.

ACLEI notes that the most beneficial model would marry 'pro-disclosure' messages with 'ethical conduct' messages. To this end, a further role might be to establish an 'ethical advice' telephone service.

An alternative model might be to embed a 'whistleblower agency' function within a new body which would have a broader remit for promoting ethics in all public sector agencies. It is unlikely that such an agency would require coercive information-gathering powers, with the possible exception of investigating allegations of victimisation or reprisal.

Third party disclosure (Terms of Reference 5(d))

Disclosures by a whistleblower to a third party (i.e. beyond a defined external agency) are problematic as it may present a significant challenge to agency secrecy provisions.

ACLEI considers that the introduction by public sector agencies of internal procedures that meet prescribed minimum standards, together with the introduction of a protected disclosure regime that enables independent scrutiny of claims by a prescribed external agency, as well as external oversight of agency handling of matters and investigation of reprisal allegations, should be sufficient to ensure that information provided by whistleblowers is properly handled.

These initiatives ought to obviate the need to legitimise disclosures of information that might breach agency secrecy provisions, other than to prescribed agencies for prescribed purposes.

***'Roll-overs' and the criminal culpability of whistleblowers
(Terms of Reference 6)***

A controversial area of professional reporting relates to the culpability of whistleblowers who, in giving information that implicates others, implicate themselves also and potentially expose themselves to criminal, civil or disciplinary actions.

An allied topic is the investigation technique known as 'roll-overs', whereby a person agrees to become a witness against another partner of the criminal enterprise in exchange for some benefit. Such benefits might include offers of immunity from adverse action, physical protection measures of the witness against victimisation, protections against derivative use of coerced testimony, or letters of comfort if convicted to seek to shorten a custodial sentence.

These issues need to be professionally managed using procedures that are accountable, with decisions made in the overall public interest using the utmost judgement.

Matters relating to indemnity against prosecution should remain with the Commonwealth Director of Public Prosecutions.

'Whistleblowing' and its proper management is a complex area, although one that can be a significant deterrent to unethical, negligent or insensitive administrative conduct.