



Australian Government

**Australian Commission for
Law Enforcement Integrity**

16 January 2009

Dr Jacqueline Dewar
Secretary
Parliamentary Joint Committee on the Australian
Commission for Law Enforcement Integrity
Parliament House
CANBERRA ACT 2600

Dear Dr Dewar

Additional Information – Inquiry into law enforcement integrity models

I refer to your letter of 16 December 2008, requesting additional information as part of the Parliamentary Joint Committee's Inquiry into law enforcement integrity models. ACLEI's response is attached.

I would be glad to provide further information should you or the Committee require it.

In the first instance, please contact the Manager Policy & Research, Mr Nick Sellars.

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Yours sincerely

Philip Moss
Integrity Commissioner

**PARLIAMENTARY JOINT COMMITTEE ON THE
AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY**

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Question No. 1

The Committee asked:

At the public hearing on 26 September 2008, held in Canberra, you informed the committee that you had committed to working with the Commonwealth Ombudsman to develop a more suitable definition of corruption (Committee Hansard, p. 12). Could you please provide further information, specifically:

- a. the limits of the existing definition;
- b. what an amended definition would achieve;
- c. the process that will be employed to revise the current definition; and
- d. when you expect this work to be completed?

The answer to the Committee's question is:

Against the background of current experience, ACLEI sees no problem with the present definition of corruption. ACLEI's deliberations with the Commonwealth Ombudsman, the ACC and the AFP relate to calibrating administrative arrangements about classification, notification and referral of corruption issues between agencies.

The *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act), at section 6, sets out the meaning of *engages in corrupt conduct*. In summary, 'corrupt conduct' occurs when a staff member of a law enforcement agency:

- abuses his or her office as a law enforcement officer;
- perverts the course of justice; or
- in light of his or her duties and powers as a law enforcement officer, otherwise engages in corruption.

The LEIC Act does not create a criminal offence for corruption. Instead, the work of the section 6 definition is as part of the machinery that establishes a jurisdiction so that the Integrity Commissioner may exercise a relevant power.

The *Annual Report of the Integrity Commissioner* in 2006-07 (at p 16), and again in 2007-08 (at p 51), each noted with approval the advantages of the LEIC Act approach to defining corruption. These benefits include:

- providing flexibility to the Integrity Commissioner, in that the net is cast wide to avoid the hindrance of an unrealistically tight definition that might exclude some types of inquiry;
- recognition that corrupt practices may manifest differently over time or as a result of changes in law enforcement or regulatory strategies (many corrupt practices are related to criminal activity, and both adapt readily to new environments);
- ensuring that the concept of corrupt conduct is not reduced solely to criminal conduct; and
- providing for the idea of corrupt conduct as evolving, so that the Integrity Commissioner may take account of community expectations and standards in exercising his or her powers, including making findings.

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However, a possible consequence of the broad definition is that uncertainty may arise between agencies that have various obligations under the LEIC Act.

To avoid this problem, when he was Acting Integrity Commissioner, Prof. McMillan commenced a project which aimed to clarify these matters for administrative purposes. Prof. McMillan, as Commonwealth Ombudsman, and the Integrity Commissioner are now seeking to finalise this project jointly, together with the ACC and AFP.

In December 2008, the Commonwealth Ombudsman provided ACLEI with a draft discussion paper, and it is hoped the joint project will be completed by the end of April 2009.

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Question No. 2

The Committee asked:

Has your organisation given consideration to the prospect of ACLEI gaining real-time access to the AFP and ACC's complaints systems? If so, please outline the benefits and purposes of this access (i.e. solely for quality assurance or additionally as a form of notification). Have discussions been held with the AFP and ACC on this matter? What are the resource implications? What are the challenges to achieving access?

The answer to the Committee's question is:

Bringing corruption issues to ACLEI's attention:

The LEIC Act requires the CEO of the ACC and the AFP Commissioner to bring any corruption issue to the Integrity Commissioner's attention in writing.

Sections 17(1)(c) and 19(4) of the LEIC Act provide a mechanism for the Integrity Commissioner and the head of a law enforcement agency to enter into an agreement about the way in which information or documents may be given to the Integrity Commissioner. These provisions anticipate the possibility that notification of corruption issues could occur through a database at some future point.

The administration of that system has settled into a practice whereby corruption issues, including 'borderline' issues, are brought to ACLEI for discussion prior to formal notification. Notification, when warranted, then occurs in writing. ACLEI's preferred arrangement is to continue the current practice that combines active notification and discussion.

Access to data for investigations:

ACLEI seeks real-time access to 'PRS PROMIS', the case management system used by AFP Professional Standards. Discussions have commenced recently with the AFP about this proposal.

One challenge will be to ensure that ACLEI's access to agency databases could be covert, if required.

Establishing this access would allow ACLEI to view independently any electronic files held by AFP Professional Standards that are relevant to ACLEI's assessments and investigations, and streamline some of the information-sharing requirements relating to these functions.

ACLEI's intended fit-out of premises will enable law enforcement information systems to be accessed securely by ACLEI operations staff. This measure will meet a key precondition of gaining access to this, and other, information sources.

Data-mining:

Through data-mining and analysis, complaint and other misconduct information can reveal patterns of behaviour and risk that might detect corruption or provide an 'early-warning' about the potential for corruption to occur.

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ACLEI understands that several State integrity agencies have covert access to complaint data to inform detection activities, risk assessments, intelligence reporting and operational decision-making.

With additional resources, ACLEI would develop an in-house corruption-detection capability that incorporates data-mining.

This measure would not detract from the present cooperative approach to handling corruption issues. Rather, it would allow ACLEI to complement the detection efforts of each of the agencies through a program of strategic intelligence-gathering, early-warning detection, and analysis of patterns and trends. The resources needed to provide this capability are not yet known.

One challenge will be to gain access to appropriate data sources, which appear to be distributed across a number of databases and information sources. (During the current Inquiry, the Committee received evidence from Assistant Commissioner Barbara Etter, Corruption Prevention and Investigation, Western Australia Police, about how a similar challenge was met in that State.)

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Question No. 3

The Committee asked:

On page 9 of your submission, you state that the establishment of a parliamentary inspector would be 'unduly burdensome'. Could you please outline your reasons for this assessment? Under what circumstances, if any, would you support the establishment of a parliamentary inspector?

The answer to the Committee's question is:

Three concerns commonly underpin the provision of special accountability mechanisms for agencies with coercive information-gathering and reporting powers:

- First, governments seek to ensure that executive oversight agencies should not become 'star-chambers' – essentially a concern about abuse of power;
- Secondly, governments recognise the potential for the oversight agency to be captured either by corrupt causes or 'closeness' to the agencies being overseen– essentially a misuse or diversion from an agency's proper function; and
- Thirdly, it is sometimes thought that a special complaint-handling process is appropriate for an agency that deals with the investigation of corruption issues.

In ACLEI's case, these considerations are met by various legislative arrangements. These include:

- Provision for a Parliamentary Joint Committee to oversee the Integrity Commissioner's performance (Part 14, LEIC Act), with strong information-gathering powers (s 216);
- Requirement for the Integrity Commissioner to be a person who has been enrolled as a legal practitioner for at least 5 years (section 175(2), LEIC Act);
- A statutory onus on the Integrity Commissioner and ACLEI staff members to report an ACLEI corruption issue (section 153 and 174, LEIC Act);
- Provision for the Minister to authorise a person to conduct a 'special investigation' into an ACLEI corruption issue (Part 12, Division 4), including access to the same powers as the Integrity Commissioner;
- The Commonwealth Ombudsman has jurisdiction in relation to handling complaints about, and conducting own motion investigations into, matters of administration concerning ACLEI;
- In ACLEI's case, the authorisation for use of listening devices and for telecommunications interception is by warrant, and then each use is subject to statutory external inspection by the Commonwealth Ombudsman; and
- A supervisory jurisdiction for Courts to consider the operation of the principles of procedural fairness.

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Other jurisdictions have adopted different arrangements for various reasons, including as a measure to deal with the Commonwealth's requirements for approving Telecommunications Interception powers for use by State agencies, or to deal with the substantial intelligence function associated with the investigation of organised crime. There is no common model for an 'Inspectorate' among the States – each performs different functions, with varying degrees of expense to the respective Government.

Given the accountability mechanisms already in place relating to ACLEI, and noting ACLEI's current staffing level, creating an Inspectorate would be an expensive measure that appears not to be warranted by ACLEI's present circumstances. At some future time, if ACLEI's jurisdiction were extended or resources increased significantly, the need for an inspector could be reviewed.

Should the Committee decide to pursue the idea, note might be taken of issues that arose in the States during 2008. Amongst these concerns were: criticisms in the media¹ surrounding the publication in the Annual Report 2007-08 of the Special Investigations Monitor (Victoria) of information about one of the Office of Police Integrity's corruption investigations; and other media reports of disputation about the role of the WA Inspector of the Crime and Misconduct Commission. Careful design of legislation may help to avoid these problems.

¹ Keith Moor, *Herald Sun*, 'Bungle may let bent cops escape', November 24, 2008.

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Question No. 4

The Committee asked:

In your submission you note that 'a major expense of technical support for operations is the cost of keeping pace with technological change', and you suggest as a solution the introduction of a 'cooperative program... amongst the integrity agencies' (p. 13). Could you provide further information about how you would see this working, specifically:

- a. What aspects of technical support could be centralised/shared?
- b. What would be the most effective forum through which this and other matters of common interest could be addressed by the various integrity agencies?
- c. Are there other operational areas where efficiencies could be gained through State and Commonwealth cooperation?

The answer to the Committee's question is:

In the use of coercive and intrusive powers, ACLEI has much in common with each of the State integrity agencies. These common aspects include shared challenges, as well as opportunities to achieve efficiencies and avoid duplication.

The challenges include:

- Keeping pace with technological change, particularly in acquiring and updating electronic surveillance capabilities;
- Having available a pool of covert operatives who are skilled at overcoming counter-surveillance techniques and who are unlikely to be recognised in a jurisdiction;
- Staying up to date with best practice relating to the use of coercive powers;
- Keeping up to date with, and driving forward, relevant research agendas to improve practices; and
- In ACLEI's case, the need to access secure and technically-appropriate hearing room facilities in various States.

Currently, several measures are planned or in place to address these challenges, as the following examples show.

First, the Attorney-General's Department is giving consideration to the possibility of consolidating telecommunications interception function in Australia, based on shared agency models overseas. ACLEI welcomes this initiative.

Secondly, ACLEI has made arrangements with the State agencies for the use of physical and technical surveillance resources, should the need arise, on a cost-recovery basis.

Thirdly, the Integrity Commissioner meets from time to time with the ACC Examiners to discuss emerging issues relating to the use of coercive powers.

Fourthly, ACLEI has joined with the Police Integrity Commission (NSW) as a 'Partner Agency' sponsor of the *Australian Public Sector Anti-Corruption Conference (APSACC)* to be held in Brisbane in July 2009. APSACC is jointly hosted by the Crime and Misconduct Commission (Qld), the Independent Commission Against Corruption (NSW), and the Corruption and Crime

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Commission (WA). As a prelude to APSACC, ACLEI will participate in a policy and research conference for police integrity agencies. This opportunity will extend ACLEI's co-operation with like agencies.

Finally, ACLEI has arrangements in place with the ACC and State integrity agencies to use secure and technically-appropriate facilities to conduct coercive information-gathering hearings outside of Canberra.

Since there are similar issues and challenges facing the integrity agencies, the Integrity Commissioner keeps in regular contact with his State counterparts. In the quest to be more efficient, there may be merit in establishing some structure around the relationship between the various heads of integrity agencies to enhance cooperation across boundaries, and to create an environment to facilitate more shared initiatives.

One possibility would be to establish a 'National Council' or 'Round Table' of integrity agencies that exercise coercive and intrusive powers. In the first instance, the Integrity Commissioner will pursue this idea with his State counterparts.

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Question No. 5

The Committee asked:

On page 10 of your submission you suggest that ‘the committee might consider whether it would be feasible and appropriate to require State and Territory law enforcement agencies, and other Federal government agencies with law enforcement powers, to provide information to the Integrity Commissioner about corruption issues concerning staff who are working with, or may have recently worked with, the ACC or AFP’. Could you further clarify the circumstances in which you envisage such a requirement would assist ACLEI? Could non-legislative means achieve the desired outcome – for example, through memoranda of understanding?

The answer to the Committee’s question is:

This idea relates to ACLEI’s desire to strengthen the LEIC Act integrity system. Currently, there is no arrangement whereby State or Territory agencies or other Australian Government agencies must inform ACLEI of any concerns they may have about the integrity of ACC or AFP officers. Sources of such information might come from officers of these agencies who have been seconded to, or have recently worked in, task forces which included ACC or AFP officers.

The anecdotal evidence is that there is a high degree of ‘traffic’ or ‘cross-pollination’ between law enforcement agencies at State/Territory and Federal levels. Despite all of the positive benefits of sharing resources, and there are many, there is a residual risk that corruption can be spread along these same pathways. Hence, ACLEI wishes to ensure that all agencies cooperate to the maximum extent to detect and report suspicions about corruption.

While ACLEI’s initial proposal for legislation is one way to achieve this goal, it is not be the preferable way forward at this time.

Instead, ACLEI has been exploring other ways, within its resources, to achieve its objective, based on consultation and cooperation. For instance, during 2008, the Integrity Commissioner delivered presentations about ACLEI’s role to the:

- Senior Officers’ Group of the *Ministerial Council for Police and Emergency Management Ministers, Police* (comprising Heads of Federal, State and Territory Justice Departments, and Police Commissioners); and
- Inter-Governmental Committee on the Australian Crime Commission (comprising State and Territory Police Ministers).

At present, the various policing agencies already cooperate across jurisdictions on a unilateral and multi-lateral basis, and recognise the potential for corruption incidents to have their origins in several jurisdictions. Integrity agencies, too, have recognised the problem and cooperate in similar ways. As noted, ACLEI is aware that this dimension of its work deserves proper attention.

Accordingly, ACLEI will continue to liaise with each of the State and Territory law enforcement agencies, and, when resources allow, ACLEI will consider initiating Memoranda of Understanding with the Professional Standards areas of relevant agencies, aimed at facilitating practical solutions regarding the detection and reporting of corruption that might involve the ACC or AFP.

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Question No. 6

The Committee asked:

Several witnesses expressed support for the secondment of local police officers to the respective integrity agency. It was seen as an important means for the integrity agency to gain an understanding of local policing culture and a way of further instilling integrity values in the police service via individual police officers. This was felt to outweigh the counter argument that the secondment of local police officers posed a risk to the integrity of corruption investigations. The *LEIC Act* provides for the secondment of AFP and State and Territory officers to ACLEI. Can you comment on the potential and risks of the secondment of AFP officers to ACLEI and the circumstances under which you would pursue AFP secondments?

The answer to the Committee's question is:

As the Committee notes, there are opposing views on the question of secondments of serving or former police working in an independent integrity agency in a role that involves directly investigating misconduct in the officer's (or former officer's) agency. These concerns are about perceptions, and about the real risk of compromise, weighed against any practical benefits of 'insider knowledge' and influencing police culture.

It is sometimes overlooked, but the largest source of investigative expertise is policing agencies. This is even more the case for rarer skill sets such as internal investigations experience in a law enforcement context,² surveillance, investigation of serious and complex crimes, and informer management. For these reasons, it can be a challenge for integrity agencies to source appropriately skilled staff.

Different approaches have been adopted in the States. In the case of the Police Integrity Commission (NSW), the relevant legislation prohibits the employment of serving, or former, NSW Police Service members. In larger, multi-function agencies like the Crime and Misconduct Commission (Qld) there is a greater scope to accommodate regular exchanges of staff in ways that minimise the risk of compromising highly sensitive police integrity operations.

During the course of 2008, ACLEI conducted a number of investigations jointly with the agencies it oversees. This arrangement recognises that the ACLEI model involves an integrity partnership between ACLEI and the law enforcement agencies (this theme is explored in more detail in the *Annual Report of the Integrity Commissioner 2007-08* at page 4).

This approach, together with the ability to second law enforcement officers to assist the integrity Commissioner (section 199), also recognises the practical considerations relating to the use of ACLEI's law enforcement powers, such as arrest. These considerations include: accountability measures; OH&S; arranging use of force training; and carrying and storing weapons and restraints in accordance with existing law. All of these issues would present particular challenges for a small agency like ACLEI, were cooperative arrangements and secondments not possible.

² Noting the special challenge of investigating police corruption, namely overcoming the counter-surveillance skills of those being investigated.

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ACLEI has made plans to move to a joint task-force model, when circumstances require it. The design for ACLEI's proposed Operations accommodation, for which capital works funding was provided in the 2008 Budget, will have segregated facilities that will allow for joint taskforce activities to be accommodated, thereby minimising the risk of compromise to ACLEI's other investigations.

Under this arrangement, secondees to ACLEI, whether they be from the ACC, AFP, or other Australian Government or State and Territory agencies, can work with ACLEI operations staff on case-by-case basis, rather than under a rotational system.

ACLEI considers that these measures are appropriate to current circumstances.