

## Chapter 3

### The ACLEI model and the broader integrity system

3.1 This chapter examines the current approach to integrity assurance across the public service, with a focus on how ACLEI does and could relate to the broader integrity system.

3.2 It commences with a summary of evidence relating to definitions of corruption, particularly in the context of the LEIC Act, before moving to an examination of the approach taken to integrity assurance across the public service, including the potential for a more focused corruption fighting approach. Though not explicitly within the inquiry's terms of reference, due to the amount of evidence presented by witnesses and submitters, the case for a Commonwealth-wide anti-corruption commission is considered.

3.3 The committee makes a number of recommendations that would enhance overall Commonwealth public sector integrity, through further definition of ACLEI's relationship with other agencies with an integrity and accountability function.

#### What is corruption?

3.4 While at superficial level there is a common understanding of what corruption means, it is a concept that continues to be contested and explored by anti-corruption practitioners. There is no internationally agreed definition of corruption; nor is there consensus about the range of activities that are seen to constitute corrupt conduct. Professor AJ Brown notes that in spite of an 'unprecedented demand for a single, universal understanding of the idea of corruption, capable of spanning international, cultural and religious borders', no such objective has been achieved.<sup>1</sup>

3.5 Transparency International provides a broad definition of corruption as 'the abuse of entrusted power for private gain'.<sup>2</sup> This characterization reflects a trend to 'strip the definition of corruption back' leaving open to 'legislators, law reformers and social agents' the task of articulating a more specific definition of corruption and corrupt behaviour that is tailored to the particular political, economic and cultural context in which the definition is formulated.<sup>3</sup>

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1 Professor AJ Brown, 'What are we trying to measure? Reviewing the Basis of Corruption Definition', in Charles Sampford, Arthur Shacklock, Carmel Connors and Fredrik Galtung (eds.), *Measuring Corruption*, Ashgate Publishing Ltd, 2006, p. 57.

2 Transparency International, [www.transparency.org/news\\_room/faq/corruption\\_faq](http://www.transparency.org/news_room/faq/corruption_faq) (accessed 29 June 2010).

3 Professor AJ Brown, 'What are we trying to measure? Reviewing the Basis of Corruption Definition', in Charles Sampford, Arthur Shacklock, Carmel Connors and Fredrik Galtung (eds.), *Measuring Corruption*, Ashgate Publishing Ltd, 2006, p. 59.

### *Corruption within the law enforcement context*

3.6 ACLEI has observed that within the law enforcement context 'corruption involves improper actions or abuse of power and trust by an official'.<sup>4</sup> Extending this understanding ACLEI stated:

[Corruption] entails conduct that undermines or misuses the legitimate functions of a law enforcement agency, or of a position within an agency, for criminal, political or personal purposes.<sup>5</sup>

3.7 Section 6 of the LEIC Act provides a definition of corrupt conduct (although not of corruption per se) as follows:

- a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
- b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
- c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.<sup>6</sup>

3.8 Comprehensive examples of behaviour that may constitute corruption within the law enforcement context are listed at Appendix 4. This includes conduct that:

- illegitimately seeks to gain profit or benefit for self or others;
- uses proper powers and discretions for an improper purpose;
- uses law enforcement functions to support or assist criminal activity;
- misuses information to support or assist criminal activity;
- sabotages the impartial detection, investigation and prosecution of crimes;
- may assist infiltration of an agency by criminal or corrupt groups;
- places at risk the impartial function of an agency; or
- facilitates corruption.<sup>7</sup>

3.9 According to ACLEI, the legal definition of corrupt conduct within the LEIC Act is deliberately broad in order to accommodate the evolving nature of the concept of corruption and corrupt activity. As ACLEI submitted:

‘Corruption’ is a nebulous term, and is frequently misunderstood and misapplied. Defining the term often seems to be counter-productive.

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4 *Annual Report of the Integrity Commissioner 2008–2009*, p. 68.

5 *Annual Report of the Integrity Commissioner 2008–2009*, p. 68.

6 *Law Enforcement Integrity Commissioner Act 2006*, s. 6.

7 *Annual Report of the Integrity Commissioner 2008–2009*, pp 69–71.

ACLEI uses a descriptive approach to give the term meaning in the LEIC Act context...

Identifying what makes conduct *corrupt* rather than simply *unlawful* or *unethical* is difficult, and it is important to consider individual circumstances. Corrupt conduct will often involve a breach of the law, but not all breaches of the law involve corrupt conduct. A person could also act lawfully, but corruptly. A person's intention in acting in a particular way is relevant, but is not always the determinative factor in deciding if conduct were corrupt...

The LEIC Act definition is deliberately broad, because corruption may involve a broad range of misconduct or behaviour, and because corruption is adaptable – it changes to take advantage of new opportunities.<sup>8</sup>

3.10 However, Mr Howard Whitton, Fellow, ANZSOG Institute for Governance, was critical of the current broad definition on the grounds that it may not be easily understood without legal advice. This lack of specificity could mean that non-experts may not approach the Integrity Commissioner or ACLEI with information.<sup>9</sup> Appearing before the committee in March 2011, Mr Whitton argued:

[T]he definition of corruption in the LEIC act is very vague. In fact, corruption itself is not defined. Corrupt conduct is defined in terms of abuse of office. There are difficulties with that, in that most public servants these days, certainly in the Commonwealth, do not occupy an office.

Further, there is the difficulty when it comes to explaining to the public at large, either in terms of explaining ACLEI's jurisdiction or in a training program, for example, what corruption is.<sup>10</sup>

3.11 Mr Whitton instead favoured the more specific language used to describe corruption in the *Independent Commission Against Corruption Act 1988* (NSW). This definition, reproduced at Appendix 5, includes 25 matters that may comprise corrupt conduct. Corrupt conduct itself is defined as:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the

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8 ACLEI, *Submission 14*, p. 25.

9 Mr Howard Whitton, *Submission 24*, p. 8.

10 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p. 13.

course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.<sup>11</sup>

3.12 Mr Whitton contended that the specification of categories of corrupt conduct is more useable and, in particular, encourages whistleblowing as intending whistleblowers can be more certain about whether their actions are protected by the legislation.<sup>12</sup>

3.13 However, Professor John McMillan, while in favour of further development of the definition of corruption, contended that the New South Wales definition was perhaps overly prescriptive:

The ICAC Act has a definition of corruption and there are similar definitions in the legislation establishing the counterpart Western Australian and Queensland bodies. There is a deal in common in those and with the United Nations and other definitions, such as breach of trust, perversion of the course of justice, bribery and the like, but there are other areas of difference...[I]t seemed to me that the definition of corruption in the New South Wales ICAC Act went further than the ACLEI Act, and further than I think it should go as well. Again, it bolsters that need for Commonwealth purposes to define what we mean as corruption in that context.<sup>13</sup>

3.14 The Public Service Commissioner, Mr Stephen Sedgwick, responding to arguments for an extension of ACLEI's jurisdiction, noted that the broad definition of corruption encompassed a range of behaviour that they did not perceive to be corruption:

On the evidence that is available to us, it just does not seem that there is a case for extending the purview of ACLEI, particularly in circumstances where corruption is such an ill-defined term. You can see that in some of the material that has been presented to you. You have been given information that includes as corruption stuff that we just regard as being poor practice and bad management, and it needs to be dealt with in that way.<sup>14</sup>

3.15 The Commonwealth Ombudsman, Mr Allan Asher commented that there were already definitions of matters such as fraud, misuse of information and improper disclosures. Mr Asher did not see the need for a more specific definition of corruption, stating:

What you are looking at instead is a range of behaviours and outcomes which are unacceptable and unwanted. For example, in our own area we often speak about administrative deficiency. We do not find a need to have

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11 *Independent Commission Against Corruption Act 1988*, s 7–9; reproduced in *Submission 24*, pp 9–12.

12 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p. 13.

13 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 5.

14 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 8.

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a clear legal definition of that. Instead, we just describe administrative action that fails to reach its objective, is unfair or unjust or sometimes unlawful.<sup>15</sup>

### *Delineating corruption issues*

3.16 The definition of corruption and what constitutes corrupt conduct is also important for government agencies both involved in and subject to integrity oversight. A vague definition can complicate both compliance with integrity measures and jurisdictional delineation between integrity agencies. For example, the AFP submitted that the current broad definition of corrupt conduct:

creates an element of uncertainty in relation to matters that the AFP is obliged to refer to the Integrity Commissioner.<sup>16</sup>

3.17 Commander Mark Walters from the AFP outlined the context within which this submission was made:

[W]here there has been a bit of, shall we say, tension is a view around what should be notified to the Integrity Commissioner in terms of conduct and what might fall within that broader definition of corruption. Some things are quite clear and fall within the definition of engaging in corrupt conduct. But there is other conduct that we have referred to us in Professional Standards, that probably falls into a grey area, and there would be some interpretation around whether it is in fact conduct that would require notification to the Integrity Commissioner or it would be investigated by AFP Professional Standards.<sup>17</sup>

3.18 Commander Walters noted that there would be advantages and disadvantages in tightening up the definition in the LEIC Act and stated that the development of a 'framework' for interpretation agreed between all parties would be the best course of action:

[I]f we can in a collegiate way come up with a framework that allows us to give interpretation to corruption and what should be notified, that is probably the best outcome for the current situation.<sup>18</sup>

3.19 The ACC noted the benefit of the flexibility inherent in the current broad definition, commenting:

We have a view that the way the act is currently constructed allows us to make well judged decisions about what to refer there without being overly prescriptive. We are working with ACLEI and there is some work going on around definitional matters and how you would do that. I think that everyone agrees that it is important not to be too prescriptive because the

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15 Mr Alan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 8.

16 AFP, *Submission 10*, p. 2.

17 Commander Mark Walters, AFP, *Committee Hansard*, 23 October 2009, p. 14.

18 Commander Mark Walters, AFP, *Committee Hansard*, 23 October 2009, p. 15.

exposure we have had so far suggests that there is no pattern, general theme or trend. Things tend to emerge quite differently each time. It is a balance between what the right definition is and what is overly prescriptive, so that some stuff will not be missed out. It is a very delicate issue, but one that we all focus on. Personally, I am inclined towards a broader interpretation from the agency's referring perspective...<sup>19</sup>

3.20 The Commonwealth Ombudsman's Office reported in 2009 that it had liaised with ACLEI to develop an agreed definition of corruption but, at that time, a shared definition had not yet been achieved. The Ombudsman's office explained that:

Defining what falls within the term would help to delineate the jurisdictional boundaries between the ACLEI, the AFP, the ACC and the Ombudsman, and to define the duty of the AFP and ACC to notify the ACLEI of corruption issues.<sup>20</sup>

3.21 Reflecting on his former role as the Commonwealth and Law Enforcement Ombudsman, Professor McMillan informed the committee that:

I see it as important to expand on the rather open-ended definition of corruption issues given in the legislation. That definition is important for delineating the responsibilities of different agencies.<sup>21</sup>

3.22 Professor McMillan recommended that the agencies concerned, including ACLEI, the Commonwealth Ombudsman, the AFP and the ACC should be tasked with developing a draft definition or draft policy on corruption, with which they could then consult with the Australian Parliament.<sup>22</sup>

#### *Committee view*

3.23 The committee notes the arguments above both for and against the development of a more specific definition of corruption. While understanding that a broad definition allows for flexibility, the committee is of the opinion that a more detailed and comprehensive definition of corruption is required. The committee considers that further definition of the term would provide greater clarity to the anti-corruption work conducted by ACLEI, while serving to more effectively delineate corruption issues from issues better handled by other agencies.

3.24 The committee considers that as ACLEI has now been in existence for four years, its understanding of corruption in the context of law enforcement has developed to a point that allows further definition of the term.

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19 Ms Jane Bailey, ACC, *Committee Hansard*, 23 October 2009, p. 50.

20 Commonwealth Ombudsman's Office, answer to question on notice, 14 August 2009 (received 8 September 2009), p. 1.

21 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 2.

22 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 3.

3.25 The committee commends the work undertaken to-date by the various agencies involved to better clarify the behaviours and actions that constitute corrupt conduct. However, the committee would like to see this work concluded, in the form of a more detailed and comprehensive agreed definition of corruption.

3.26 For this reason, the committee recommends that the Integrity Commissioner, the Commonwealth Ombudsman, the Public Service Commissioner, the Auditor-General and the Attorney-General's Department collaborate to develop a more detailed and comprehensive definition of corruption for the purposes of the LEIC Act. The ICAC definition together with ACLEI's examples of corrupt conduct as set out in paragraph 3.8 above and Appendix 4 below, would be a suggested starting point. A draft paper outlining a proposed new definition of corruption should be publicly released for consultation no later than November 2011 to allow for the amendment of the definition in the LEIC Act by June 2012. The consultation should include this committee.

### **Recommendation 6**

**3.27 The committee recommends that the Integrity Commissioner, the Commonwealth Ombudsman, the Public Service Commissioner, the Auditor-General and the Attorney-General's Department develop a more detailed and comprehensive definition of corruption for the purposes of the *Law Enforcement Integrity Commissioner Act 2006*. A proposed definition should be circulated for public consultation, including this committee, no later than November 2011.**

3.28 Establishing and implementing a sufficiently detailed corruption definition would also provide a stronger basis for the reporting and measurement of corruption issues. An appropriate definition may have applicability to the broader Commonwealth integrity system discussed below.

### **Approaches to integrity assurance**

3.29 Mr Howard Whitton reported to the committee that there is a diversity of ways in which corruption is approached internationally, which could inform Australia's approach. However, as he explained:

We tend to adopt uncritically the conceptualisation favoured under the influence of the World Bank and the OECD in the Western world, which is characterised by a disease model in which corruption is regarded as akin to a mass infection of some kind for which one day some magic cure will be discovered by a scientist and all will be well. This abstraction can have rhetorical value, but it seriously misleads thinking about policy responses to corruption as it really is. Further, the immunisation model is seriously flawed. The immunisation model states broadly, as we have heard, that you make some changes in the system at the top of the culture and you let the culture grow with this magical resistance to corrupt conduct within its structures: it does not happen.

By contrast, in 2009 UN Secretary-General Ban Ki-moon warned specifically against the disease model. He said:

'... corruption is not some vast impersonal force. It is the result of personal decisions, most often motivated by greed.'

The alternative conception for thinking about corruption might be called the 'termite infestation' model, in which corruption is regarded as opportunistic, individualised, active and deliberately covert. When well-resourced and organised, corrupt conduct by individual officials can feed organised crime, defeat the rule of law, support state capture, create porous national borders, undermine markets and the provision of state services, compromise the integrity of public institutions, support trafficking and terrorism, sustain money laundering and encourage clientelistic networks of patronage and mutual obligation for mutual benefit in a self-enforcing system. This is the model, I suggest, that we need to take seriously and to think about when we talk in terms of ACLEI and its possible role in preventing and detecting corruption in Australia.<sup>23</sup>

3.30 For this reason, Mr Whitton advocated the development of effective detection and prevention systems, sanctions, targeted pro-integrity policies and practices and institutional incentives that contribute to a corruption-resistant ethos at the institutional level.<sup>24</sup>

3.31 The Commonwealth Ombudsman informed the committee that integrity systems could adopt one of three models. A common one was a law enforcement approach that received allegations and investigated accordingly.<sup>25</sup> This reactive model is represented in several state anti-corruption bodies.<sup>26</sup>

3.32 A second model involved a focus on prevention and education. This model emphasises the development of internal governance in order to mitigate potential weaknesses.<sup>27</sup>

3.33 A third possible model was a hybrid of the first two. As the Commonwealth Ombudsman saw it, ACLEI itself represented the hybrid approach, stating:

ACLEI...tends to describe itself as a law enforcement agency, which would be closer to [the first model], although it does have some other roles as well. The initial conception some years ago would have had it more at that second level. Perhaps if we were to look at it now we would say that it is closer to the third but sees itself more as the first.<sup>28</sup>

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23 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p 10.

24 Mr Howard Whitton, *Submission 24*, p. 6.

25 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 2.

26 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 4; the committee notes that, in its previous inquiry into law enforcement integrity models, it found that several state anti-corruption agencies do include education and prevention as aspects of their work. See *Inquiry into Law Enforcement Integrity Models*, February 2009, pp 31–38.

27 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 2.

28 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 6.



3.34 The committee notes the importance of supplementing an investigative capacity that can deal with allegations of corruption with a prevention model that strengthens governance and reduces corruption incentives. As Mr Whitton described it, 'good people, without good institutions, will not succeed; and good institutions, without good people, will fail.'<sup>29</sup>

3.35 With this in mind, the committee reiterates its support for a risk-based approach to integrity, noting that wherever incentives for corrupt behaviour exist, so too will that risk. The committee prefers an integrity approach that assumes the existence of corruption and acts accordingly.

### *The importance of enhanced corruption detection*

3.36 The committee accepts statements by both the Public Service Commissioner and the Law Enforcement Integrity Commissioner that there is no evidence of serious or systemic corruption in the Australian Public Service (APS). For instance, the Public Service Commissioner stated:

There are only a small number of corruption cases reported annually across the Australian Public Service and there is no evidence that corruption within the meaning of the LEIC Act—that is to say, bribery or perverting the course of justice—is a significant issue in the APS.<sup>30</sup>

3.37 The Integrity Commissioner agreed with this assessment, stating:

The question is: is there corrupt conduct that is going unaddressed? I think the evidence of the Public Service Commissioner is correct. We have instances, but we do not have across-the-board, systemic serious issues in the Public Service, in the same way that the perception was for the agencies under ACLEI's jurisdiction, the initial ones anyway, and my experience subsequently.<sup>31</sup>

3.38 The Integrity Commissioner also noted however, that the reality of what ACLEI had found since its establishment did not accord with expectations prior to establishment. Rather than a few, serious issues, the experience of ACLEI had instead been the notification and referral of many, less serious issues. As the Integrity Commissioner explained:

There was initial expectation in ACLEI's workload that it would not be great. Indeed, the thought was that there might be three or four investigations per year that ACLEI would be engaged in. In fact, it has turned out to be quite the contrary. The number of corruption issues received and investigations made is significant and the numbers far exceeded the expectation. Such investigations that ACLEI undertakes are

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29 Mr Howard Whitton, *Submission 24*, p. 7.

30 Mr Stephen Sedgwick, Public Service Commissioner, *Committee Hansard*, 11 February 2011, p. 2.

31 Mr Philip Moss, Integrity Commissioner, *Committee Hansard*, 11 February 2011, p. 19.

mostly complex and difficult, but they would be described as being of middle order and not of royal commission significance. They are hard targets nevertheless. So here was ACLEI being established with the thought that it would be a standing royal commission dealing with a few very, very serious measures, and that has not proved to be the case. In other words, the reference to the perception that the bodies currently did not have a significant problem with corruption has been found to be correct in our experience.<sup>32</sup>

3.39 As discussed in the committee's inquiry into law enforcement integrity models, a distinction exists between complaint handling bodies and anti-corruption bodies. The primary purpose of (public sector) complaint handling bodies is to investigate and address complaints reported by individual citizens who believe they have been treated unfairly, unreasonably or improperly by a government department or agency. This is the principal role of the Commonwealth Ombudsman.<sup>33</sup>

3.40 Law enforcement and public sector anti-corruption or integrity agencies increasingly focus on serious misconduct and corruption. Through corruption detection and investigation they endeavour to expose the truth in order to curb and prevent corruption. Through risk analysis, research and education they aim to raise standards of integrity.<sup>34</sup> ACLEI fits into this second category.

3.41 As noted by Professor John McMillan, former acting Integrity Commissioner and former Commonwealth Ombudsman, these two types of agencies require a different 'skill set'.<sup>35</sup> Further, the primary focus of a complaint-handling body is the complainant. The information and lessons learnt from a complaint are important but secondary. The focus of an anti-corruption agency is the quality of the information or intelligence and its contribution, ultimately, to preventing corruption. In this scenario the informant is important but secondary. The capacity to detect potential corruption is paramount.

3.42 Mr Howard Whitton was critical of the current ability to detect corruption in the broader public service and questioned the reliance on existing statistics that suggested little to no systemic corruption:

At the national level there is still no single Commonwealth institution with a responsibility for detection and prevention of corruption other than crime

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32 Mr Philip Moss, Integrity Commissioner, *Committee Hansard*, 11 February 2011, p. 14.

33 See for example, [www.comb.gov.au/commonwealth/publish.nsf/Content/aboutus\\_role](http://www.comb.gov.au/commonwealth/publish.nsf/Content/aboutus_role). It should be noted that while processing complaints is the core role of the Ombudsman a range of other work is undertaken, for example, conducting own-motion investigations into administrative matters, undertaking research and conducting compliance audits.

34 For a useful summary of the differences between a complaint-handling body and an anti-corruption body see ACLEI, *Annual Report of the Integrity Commissioner 2006–07*, p. 18.

35 Prof John McMillan, *Committee Hansard*, 27 May 2010, p. 5.

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in the terms envisaged by the UN Convention against Corruption, which Australia has ratified but as yet has not...complied with.<sup>36</sup>

3.43 This point was echoed by Professor Tim Smith, Chair of the Accountability Round Table, who noted the following:

It seems to me you come to the point where you say, human nature being what it is, there will always be a corruption problem in government. It will surface from time to time, but there will always be a problem. The conclusion I came to was that what you are looking at is a risk management problem. I was interested to hear the head of ACLEI talking about their approach, which is a risk management approach. I think that is the only way you can approach it. It is unrealistic to suggest that the test of whether you do anything is whether there is corruption, because it is going on while we speak and we do not know about it. That is the harsh reality.<sup>37</sup>

3.44 The committee is therefore of the opinion that, while there is little evidence to suggest any systemic corruption in the Australian Public Service, this should not preclude the existence of an integrity system that is proactive in defending integrity, with enhanced detection methods that do not rely on accidental or incidental discovery of corrupt behaviour. As noted by the Commonwealth Ombudsman, Mr Allan Asher:

[W]hile ever there is such a large range of Commonwealth programs, and programs where the Commonwealth is directly funding activities, there are incentives around for corruption, and corruption really results from incentive plus opportunity. Those incentives and opportunities are clearly increasing quite considerably.<sup>38</sup>

3.45 In the next section, the committee examines the current integrity arrangements covering the Australian Public Service, with a view to suggesting improvements to the system's ability to be proactive in discovering corruption. Paramount in this endeavour is building better links between that system and ACLEI.

### **The Commonwealth integrity system**

3.46 As discussed by a number of witnesses, the Commonwealth integrity system is based on a multi-agency model, in which a number of agencies play a different role in encouraging and policing integrity in the Commonwealth public sector.<sup>39</sup> The committee notes that whilst each of the agencies involved play an important role in promoting integrity and countering misconduct, corruption and maladministration, this multi-agency 'model' is largely a product of history and not of design.

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36 Mr Howard Whitton, *Committee Hansard*, 21 March 2011, p. 11.

37 Professor Tim Smith, Accountability Round Table, *Committee Hansard*, 11 February 2011, p. 44.

38 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, pp 1–2.

39 See for example, Attorney-General's Department, *Submission 12*, p. 2.

### ***The current multi-agency approach***

3.47 The current Commonwealth integrity framework could be considered to be led by a number of agencies, including at minimum the Australian Public Service Commission (APSC), the Commonwealth Ombudsman, the Australian National Audit Office (ANAO) and ACLEI.

### ***APS values and the Code of Conduct***

3.48 The APSC informed the committee that the main integrity framework governing the conduct of Australian Public Service employees involved an ethical construct using the APS Values and the Code of Conduct. As the Merit Protection Commissioner, Ms Annwyn Godwin explained:

This framework, which is set out in the APS Values and Code of Conduct, comprises a number of elements which require APS employees to avoid actions which are, or could be perceived to be, corrupt. The values and the code require APS employees, for example, to behave honestly and with integrity, make proper use of Commonwealth resources and comply with all applicable Australian laws. These elements are quite clear in their intent as they are legislatively based, legally binding, nondiscretionary and can lead to real penalties if not properly observed. The penalties can range from a reprimand, a reduction in salary through to reduction in classification or, ultimately, termination of employment.<sup>40</sup>

3.49 The elements of the Code of Conduct most relevant to corruption, include the obligations to:

- behave honestly and with integrity in the course of APS employment;
- when acting in the course of APS employment, comply with all applicable Australian laws;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment;
- use Commonwealth resources in a proper manner;
- not make improper use of:
  - (a) inside information, or
  - (b) the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.<sup>41</sup>

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40 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 20.

41 APSC, *Submission 2*, p. 2.

3.50 The APSC conducts extensive training within Australian Public Service agencies, promoting an ethical culture through observance of the APS Values and Code of Conduct. As Ms Karin Fisher, APSC, observed:

We do have a wealth of education tools. We have an ethics website; there are some educational materials there. We also work very closely with the other parts of the Public Service Commission responsible for coordinating service-wide training and development, and we have public programs on ethics—or, if agencies would like something more tailored, we have a panel of consultants that we go to and use for tailored programs, as well as having some education materials that agencies can take and use and adapt themselves. But that is a broad education role in terms of ethics generally, particularly in relation to the APS Values and Code of Conduct, rather than corruption specifically.<sup>42</sup>

3.51 The committee naturally supports the promotion of the APS Values and the Code of Conduct and accepts the cultural approach to encouraging ethical behaviour. However, the committee is not convinced that the promotion of the APS Code of Conduct by the APSC of itself effectively addresses corruption risk for the following reasons.

3.52 The committee notes that the Code of Conduct only applies to a portion of Commonwealth public sector staff. Furthermore, the Code of Conduct, while an admirable statement of values, may be limited in its usefulness due to the generality of some provisions, such as the requirement to 'behave honestly and with integrity', or to 'use Commonwealth resources in a proper manner'.<sup>43</sup>

3.53 In addition, the committee takes into account the comment of the Public Service Commissioner to the effect that conduct regarded by ACLEI as potentially problematic vis a vis corruption risks may be regarded by the APSC as simply poor practice and bad management.<sup>44</sup> The committee noted evidence gathered during this inquiry and previous inquiries that instances of misconduct may be indicative of more serious underlying issues.

3.54 The committee has heard from witnesses such as the Commonwealth Ombudsman that the Australian Public Service is subject to increasing incentives and opportunities for corruption to occur at the Commonwealth level.<sup>45</sup>

3.55 The committee considers that ACLEI, with its specialised focus on corruption, particularly serious and organised criminal networks, has a role to play in enhancing the training that is provided to public servants as part of its corruption prevention role.

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42 Ms Karin Fisher, APSC, *Committee Hansard*, 14 August 2009, p. 39.

43 APSC, *APS Code of Conduct*, <http://www.apsc.gov.au/conduct/> (accessed 10 June 2011).

44 See, for example, Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, pp 3 & 8.

45 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 2.

The committee is concerned that under the terms of the LEIC Act as it currently stands, ACLEI is not able to contribute this specialised knowledge.

3.56 The committee's interim report addressed ACLEI's ability to proactively engage in corruption prevention measures, noting concerns extending back to the Senate Legal and Constitutional Legislation Committee's inquiry into the bill that established ACLEI.<sup>46</sup>

3.57 The committee reiterates its comments made in the interim report. It considers it essential that ACLEI continues and expands the range of corruption detection and prevention activities currently undertaken. In the interim report, the committee recommended the inclusion of explicit corruption detection and prevention functions under section 15 of the LEIC Act. This recommendation is entirely consistent with the objects of the LEIC Act, which have not been matched by appropriate legislative functions to date.

3.58 As noted in Chapter 2, ACLEI has proposed a third tier jurisdiction including not just law enforcement agencies, but all public service agencies. ACLEI would provide corruption prevention support to this third tier jurisdiction. Specifically, it would have an education function in relation to these agencies, providing corruption prevention advice and conducting awareness raising about corruption risks.<sup>47</sup> The committee sees value in this proposition as it will strengthen ACLEI's prevention function, in accordance with previous recommendations.

3.59 However, the committee has two main concerns with such a proposal. Firstly, an expanded education role for ACLEI encompassing the entire public service could divert resources away from ACLEI's investigatory functions and its primary focus on law enforcement. Secondly, the committee accepts arguments made by the Public Service Commissioner regarding the need to maintain a coordinated approach to public service-wide education and training. As the Public Service Commissioner noted:

The ethical framework within which the Public Service operates is very broad. The messages that we are sending out are not simply about breaches of the law; our messages are about doing the right thing. It is an ethical construct that is much bigger than a particular focus on corruption. It covers corruption, but it is much bigger than that.<sup>48</sup>

3.60 Mr Sedgwick also stated:

One of the important things there is to minimise the number of separate messages being sent. You confuse people when you send messages that appear to be overlapping and kind of unclear. The code of conduct makes it absolutely crystal clear. If you act illegally or abuse power you are in

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46 See Interim report, pp 22–25.

47 See Appendix 3.

48 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 10.

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breach of the code of conduct. That is a serious issue. We argue you do not really need another agency to say exactly the same thing.<sup>49</sup>

3.61 Furthermore, the committee does consider that the broader public service should be able to benefit from ACLEI's specialised knowledge and experience relating to corruption. The Integrity Commissioner informed the committee that ACLEI already worked with APSC's Ethics and Advisory Service in order to provide input based on its anti-corruption experience.<sup>50</sup> The committee is encouraged by this and would like to see such endeavours continue on a formal basis.

3.62 The committee therefore recommends that, rather than establishing a third tier of jurisdiction as proposed by ACLEI, that the APSC work together with ACLEI to inform the education and training that it provides to public servants. Such education and training should include the risks of infiltration or corruption of public servants by serious and organised criminal networks, even outside the realms of law enforcement.

### **Recommendation 7**

**3.63 The committee recommends that ACLEI and the Australian Public Service Commission continue to collaborate in the development of ethics training provided to public servants to include corruption prevention using ACLEI's specialised experience and knowledge.**

#### *Investigation of breaches of the Code of Conduct*

3.64 The heads of Commonwealth agencies have primary responsibility for putting in place systems and processes within their agency to ensure employees understand and carry out their responsibilities under the code of conduct and relevant legislation. Under the Public Service Act, they must also establish procedures for determining breaches of the code of conduct.<sup>51</sup> The APSC supports agency heads through the setting of standards and the issuance of guidance material.<sup>52</sup>

3.65 The Public Service Commissioner also has evaluation and inquiry functions as follows:

- to evaluate the extent to which agencies incorporate and uphold the APS values;
- to evaluate the adequacy of systems and procedures in agencies for ensuring compliance with the Code of Conduct;
- to inquire into reports made to the Commissioner as mentioned in section 16 (whistleblowing reports);

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49 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 8.

50 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, p. 18.

51 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 20.

52 APSC, *Supplementary Submission*, p. 4.

- to consider and report to the Public Service Minister on any matter relating to the APS, including such a matter referred to the Commissioner by the Public Service Minister;
- to inquire into alleged breaches of the Code of Conduct by Agency Heads and report to the appropriate authority on the results of such enquiries (including, where relevant, recommendations for sanctions); and
- to develop, promote, review and evaluate APS employment policies and practices.<sup>53</sup>

3.66 To support these functions, the Public Service Commissioner is able to conduct special inquiries, with the power to compel witnesses to give evidence and to produce documents. However, these powers are for the purpose of an administrative inquiry and the evidence gathered is not generally admissible in criminal proceedings.<sup>54</sup>

3.67 The committee notes that these evaluation and inquiry functions, including the focus on ensuring the adequacy of procedures and the Ministerial reporting function, mirror to an extent ACLEI's ongoing brief to improve law enforcement agency procedures. In ACLEI's case, the focus is on improving procedures in order to resist corruption and strengthen integrity assurance.

3.68 The committee therefore encourages an increased dialogue between the Integrity Commissioner and the Public Service Commissioner to ensure that ACLEI's specialised knowledge regarding corruption risk, particularly in regard to the potential for infiltration of the public service by organised crime, is shared with the APSC and informs their work in strengthening public service integrity.

#### *Treatment of serious issues*

3.69 Where an employee's behaviour may be both a breach of the Code and a serious criminal offence the matter is discussed with the relevant police force, generally the AFP, who may prepare a brief of evidence for the Director of Public Prosecutions.<sup>55</sup> As the Public Service Commissioner, Mr Stephen Sedgwick noted:

Investigations that raise a question of serious corruption or a breach of the criminal law are usually referred to the police. In some larger agencies they might be investigated by internal fraud units. In either case the outcome could involve both a criminal conviction and a sanction for the breach of the code of conduct.<sup>56</sup>

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53 APSC, *Supplementary Submission*, p. 4.

54 APSC, *Submission 2*, p. 3.

55 APSC, *Supplementary Submission*, p. 4.

56 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 3.



3.70 The committee considers that the current arrangement, whereby the AFP are used in the investigation of potentially criminal behaviour is appropriate. However, the committee is also of the view that in certain circumstances, serious potential corruption cases could be referred to ACLEI.

3.71 This would be beneficial due to ACLEI's experience in dealing with corruption issues and corruption risk. Furthermore, involvement of ACLEI in such cases, which would be rare based on the statistics provided by the APSC, would contribute to ACLEI's own knowledge base regarding corruption risk in Commonwealth agencies.

3.72 The Public Service Commissioner, while arguing against extending ACLEI's jurisdiction across the public service, did note the possible attractiveness of being able to involve ACLEI in the investigation of agencies outside its formal jurisdiction but with law enforcement functions.

...I am quite attracted to this notion. If I was an agency head, for example, and parts of me were in the law enforcement business and if I was investigating a case and thought I needed some help, to have the option to go to ACLEI for forensic assistance would actually be a sensible option to have. But that is not the same thing as saying that ACLEI should conduct all of their corruption investigations, particularly if that is an ill-defined term.<sup>57</sup>

## Recommendation 8

**3.73 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to provide a mechanism by which the Public Service Commissioner, with the consent of the Integrity Commissioner, could request assistance, including on behalf of any head of a Commonwealth agency, in investigating a serious corruption issue. Such a request would be made after consideration of whether ACLEI's unique experience and powers meant that ACLEI could provide greater investigatory value than the Australian Federal Police. Furthermore, to avoid overburdening ACLEI to the detriment of its primary law enforcement focus, such an arrangement should be funded by the requesting agency.**

3.74 The committee considers that this recommendation will enhance the existing Commonwealth integrity system. However, the committee notes that it is potentially a half-way measure between the existing system, and a future broader Commonwealth-wide integrity agency. The possible establishment of such an agency is discussed below.

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57 Mr Stephen Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 6.

*Commonwealth Fraud Control Guidelines*

3.75 In addition to a reliance on the Code of Conduct, the Commonwealth integrity framework also includes the Commonwealth Fraud Control Guidelines. The Guidelines place obligations on agencies and their CEOs in relation to fraud risk assessments, fraud control plans, awareness and training, handling of fraud cases and reporting.<sup>58</sup>

3.76 The Commonwealth Guidelines apply to all agencies covered by the *Financial Management and Accountability Act 1997* (FMA Act) and any bodies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act) for which the Finance Minister has made a General Policy Order in accordance with section 48A of the CAC Act.<sup>59</sup>

3.77 As noted in the interim report, the committee is concerned that the understanding of what may constitute corrupt behaviour in the public sector has been inadvertently limited by the focus on fraud control. At the time the interim report was tabled, the Commonwealth Fraud Control Guidelines defined corruption as a subset of fraud as follows:

For the purpose of the Commonwealth Fraud Control Guidelines, fraud against the Commonwealth is defined as: Dishonestly obtaining a benefit by deception or other means.

This definition includes:

- theft;
- obtaining property, a financial advantage or any other benefit by deception;
- causing a loss, or avoiding or creating a liability by deception;
- providing false or misleading information to the Commonwealth, or failing to provide information where there is an obligation to do so;
- making, using or possessing forged or falsified documents;
- bribery, corruption or abuse of office;
- unlawful use of Commonwealth computers, vehicles, telephones and other property or services;
- relevant bankruptcy offences; and
- any offences of a like nature to those listed above.<sup>60</sup>

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58 *Commonwealth Fraud Control Guidelines 2011*, p. 7.

59 *Commonwealth Fraud Control Guidelines 2011*, p. 1.

60 *Commonwealth Fraud Control Guidelines 2002*, p. 4, emphasis added.

3.78 However, the definition of fraud has changed in the revised guidelines issued in March 2011. Corruption is no longer described as a subset of fraud. Instead, the guidelines note that fraud is a form of corruption, stating:

Agencies also need to be alert to the risk of complex fraud involving collusion between agency employees and external parties. Complex fraud, which may also constitute corrupt conduct, can include instances where an employee or group of employees:

-are targeted and succumb to exploitation by external parties (bribery, extortion, grooming for favours or promises), or

-initiate the misconduct (including through infiltration of an agency by an external party).

Note that some forms of corrupt conduct, such as soliciting for bribes or secret commissions, may not cause a direct loss to the Commonwealth, but may distort the market for fair provision of services or inflate prices.<sup>61</sup>

3.79 The committee recognizes that, like other forms of corrupt conduct, fraud is a continuing and evolving risk for the Commonwealth public sector that must be handled effectively. As noted by the ANAO:

[T]he increasing focus on responsive and flexible programs to meet community expectations can expose the Commonwealth to new areas of fraudulent activity that need to be managed.<sup>62</sup>

3.80 As noted in the committee's interim report for this inquiry, the committee believes that ACLEI has opened the way for a more sophisticated and risk-based approach to understanding public sector corruption, including fraud.

3.81 The committee is therefore encouraged to see the recognition of corruption as a broader issue within the Commonwealth Fraud Control Guidelines.

### ***The Commonwealth Ombudsman***

3.82 The Commonwealth Ombudsman is responsible for ensuring procedural fairness and complaint handling across the public service. As noted by the former acting Commonwealth Ombudsman, Ms Vivienne Thom:

The Commonwealth Ombudsman has an important role to play in the integrity framework that applies to Commonwealth law enforcement agencies. This is achieved through our complaint handling, investigation and oversight of law enforcement agencies. In the second reading speech to the introduction of the ACLEI bill, it was noted:

'The Ombudsman will have a continuing role in relation to the AFP and the ACC, except in dealing with corruption issues. This will enable two

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61 *Commonwealth Fraud Control Guidelines 2011*, p. 5.

62 ANAO, *Fraud Control in Australian Government Agencies*, Audit Report No. 42 2009–10, p. 12.

complementary approaches to investigation to be brought to bear on different types of issues. Together, the Integrity Commissioner and the Ombudsman will provide the Australian public with the guarantee that the conduct of key Australian government law enforcement agencies is subject to comprehensive external review.<sup>63</sup>

3.83 The Commonwealth Ombudsman also had a historical role in investigating corruption, as explained by the current Commonwealth Ombudsman, Mr Allan Asher, who stated:

As you would know, in the early days even before ACLEI came into existence, the Ombudsman's office was responsible for some measure of investigations into corruption across the entire Commonwealth system. Indeed, our office was instrumental in part in encouraging the formation of ACLEI and its work in the law enforcement area.<sup>64</sup>

3.84 As noted in the Commonwealth Ombudsman's submission, corruption is less likely to occur in an administrative system that does not tolerate misconduct. As a result, the complaint handling and investigative role of the Commonwealth Ombudsman can make an important contribution to curbing corruption by preventing misconduct and poor administrative behaviour generally.<sup>65</sup>

3.85 As a result, ACLEI and the Office of the Commonwealth Ombudsman share a key relationship within the Commonwealth integrity sphere.

#### *ACLEI's relationship with the Commonwealth Ombudsman*

3.86 As noted above, the Integrity Commissioner and the Commonwealth Ombudsman operate in a similar space with a different focus. Where the Integrity Commissioner deals with corruption issues, the Commonwealth Ombudsman is responsible for ensuring due process and handling complaints about misconduct.

3.87 The Commonwealth Ombudsman informed the committee that since the establishment of ACLEI, his office had referred a number of matters to the Integrity Commissioner for investigation. However, ACLEI's focus is not the same as the Commonwealth Ombudsman's, which is to provide remedies or solutions for individuals who make a complaint. For this reason, the Commonwealth Ombudsman noted he had been speaking to ACLEI about mechanisms by which his office could pursue those remedies even while ACLEI investigated the corruption aspect of a matter.<sup>66</sup>

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63 Dr Vivienne Thom, Acting Commonwealth Ombudsman, *Committee Hansard*, 14 August 2009.

64 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 1.

65 Commonwealth Ombudsman, *Submission 6*, p. 3.

66 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, p. 3.

3.88 A similar issue, raised by ACLEI, is the difficulty associated with correctly categorising an issue as either corruption or misconduct, thus determining whether a matter is more appropriate for the Commonwealth Ombudsman or the Integrity Commissioner. ACLEI has proposed an amendment to the LEIC Act that would enable easier transfer of an issue that was investigated as a potential case of corruption, but upon examination was found to be an issue of misconduct. As the Integrity Commissioner explained:

I have had some preliminary discussions with the Commonwealth Ombudsman Allan Asher and suggested to him that there could be some matters that he could deal with more conveniently—for instance, corruption issues may start off as an ACLEI assessment or investigation but their disposition may change to, say, an issue that really has more of a focus on practices and procedures or misconduct. It would be convenient to have the ability under the legislation to split those matters with consultation between him and the agency to the Ombudsman's office.

There is a reciprocal ability under the Ombudsman Act. He is required to refer to me corruption issues if he is partway through an investigation that may have had the appearance at the outset of being a misconduct or a practices and procedures matter but it does...in fact take on a corruption dimension so that would be...balancing a reciprocal provision.<sup>67</sup>

3.89 The Integrity Commissioner also noted that such a mechanism could assist in avoiding problems associated with definitions of corruption and the delineation of the boundary between corruption and misconduct.<sup>68</sup>

3.90 The committee agrees that such a mechanism would improve the operation of the LEIC Act, and accordingly recommends the amendment of the LEIC Act to insert a 'more conveniently dealt with' clause similar to that used in the *Ombudsman Act 1976* to address issues of overlapping jurisdiction.<sup>69</sup>

## Recommendation 9

**3.91 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to include a 'more conveniently dealt with' clause that would enable the Integrity Commissioner to refer to the Commonwealth Ombudsman issues that are not, or through the course of investigation, it is discovered are not, corruption issues but which do relate to misconduct.**

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67 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, p. 16.

68 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, p. 16.

69 See for example, para. 6(4D)(b) *Ombudsman Act 1976*.

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***The Australian National Audit Office***

3.92 The Auditor-General is broadly responsible for providing assurance around financial statements and analysing ways to improve public administration. As such, it has relatively high level powers to demand access to information. These powers are used in conducting, amongst other functions, performance audits that focus on the effectiveness, efficiency, economy and legal compliance of a program.<sup>70</sup>

3.93 In the course of conducting an audit of a program or agency, the ANAO is potentially an agency that could discover misconduct or corruption. Mr Steve Chapman, Deputy Auditor-General, noted that the ANAO was able to refer such matters to the AFP for investigation, stating:

Confidentiality is very important and highlighted in our act, but it is probably also worth mentioning that we have a particular provision in the Auditor-General Act, section 36(2), which means that we can provide advice to the commissioner for the AFP if disclosure would be in the public interest. That would generally be where we might identify matters of fraud or corruption. We have that opportunity to pass that information on.<sup>71</sup>

3.94 However, ANAO officers who appeared before the committee were not aware of any cases in which the ANAO had used this provision to refer a matter to the AFP. Instead, where the ANAO had become aware of such instances, it was generally alerted to the fact by the agency being audited.<sup>72</sup>

3.95 Mr Chapman informed the committee that both the performance audits and the financial audits undertaken by the ANAO gave due regard to matters of fraud and corruption. ANAO has conducted a series of performance audits focusing on fraud in recent years, and is currently updating a better practice guide to agency fraud control.<sup>73</sup>

3.96 ACLEI and the ANAO do not have a formal or statutory relationship, however the committee is aware of informal contact between the two agencies over the last year. As the Deputy Auditor-General noted, there is not a high degree of overlap in their activities. Nevertheless, as two agencies operating in the integrity sphere, the committee encourages the development of a closer relationship. This is the subject of the next section of this report.

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70 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 35.

71 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 35.

72 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 38.

73 Mr Steve Chapman, ANAO, *Committee Hansard*, 11 February 2011, p. 35.

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## Coordinating across the Commonwealth

3.97 As described in the passages above, the Commonwealth integrity system relies on a number of agencies operating in distinct, but potentially overlapping spheres. A number of witnesses and submitters were of the view that this multiagency approach should be subject to greater coordination, including the potential establishment of a Commonwealth Integrity Commission to auspice anti-corruption measures across the public service.

3.98 The committee sees the merit in the arguments put forward by witnesses and submitters in favour of a formal, coordinated integrity structure across the whole of government. However, the terms of reference of this inquiry are restricted to the operation of the LEIC Act and the committee has therefore sought to limit the scope of recommendations made in this report. The committee is however prepared to revisit the issue of a broader Commonwealth Integrity Commission in a future inquiry.

3.99 Through the recommendations contained in this report, the committee has endeavoured to provide a statutory base for ACLEI's cooperation with other integrity and accountability agencies. However, the committee is also in favour of the promotion of regular information sharing and cooperation between those agencies as a matter of course.

3.100 The Integrity Commissioner noted that integrity agencies in the Prime Minister and Cabinet Portfolio meet informally on a regular basis. By virtue of ACLEI's position in the Attorney-General's Portfolio, the Integrity Commissioner has not been part of these meetings, but will attend from this year onwards. The committee considers that regular contact between these agencies and agency heads is vital and encourages such meetings wherever possible.

3.101 Evidence from witnesses and submitters proposing formal structures for the coordination of integrity measures across the Commonwealth fell into two broad categories: a coordination board and a Commonwealth Integrity Commission. Both of these options are canvassed below.

### *Coordination board*

3.102 Professor AJ Brown recommended that a statutory coordination mechanism be established to ensure that 'what has now become an expansion in the number of integrity agencies is properly coordinated'.<sup>74</sup> He further explained that:

That statutory coordination mechanism would be something that would need to ensure the coordination of investigative activity, intelligence, risk assessment activity, corruption resistance building and prevention activity.<sup>75</sup>

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74 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 4.

75 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 4.

3.103 Under the previous Victorian Labour state government, the 'Review of Victoria's integrity and anti-corruption system' had recommended the formation of an Integrity Coordination Board 'to strengthen cooperation and coordination across the integrity system'.<sup>76</sup> The review proposed that the Board be established by legislation and comprise a membership of core integrity agents. Additional membership would be extended by the Board as required. It was proposed that the Board be empowered to share information and conduct joint investigations as well as jointly conducting research, education and promotion.<sup>77</sup>

3.104 However, the new Coalition government in Victoria has announced that it will establish an 'Independent Broad-Based Anti-Corruption Commission', with the power to investigate allegations of corruption against all politicians and public servants.<sup>78</sup>

***Is a broad public sector integrity commission needed?***

3.105 Evidence to the inquiry noted the absence of broader public sector anti-corruption oversight at the Commonwealth level and argued that such oversight is required.

3.106 The Commonwealth Ombudsman argued in favour of a broader Commonwealth integrity agency on the basis that the incentives and opportunities for corruption are increasing as the Commonwealth becomes more involved with directly funding activities.<sup>79</sup>

3.107 Mr Howard Whitton endorsed the Commonwealth Ombudsman's view, noting that a Commonwealth-wide integrity commission, including all public functions and public bodies, would be in accordance with Australia's obligations under the UN Convention Against Corruption.<sup>80</sup>

3.108 Transparency International Australia also argued in favour of a broader integrity commission, stating that:

Corruption is not limited to law enforcement agencies. Urgent consideration should be given to expanding ACLEI's jurisdiction across the Commonwealth Public Service with a view to ensuring consistent and

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76 Public Sector Standards Commissioner, *Review of Victoria's integrity and anti-corruption system*, 2010, p. 33.

77 Public Sector Standards Commissioner, *Review of Victoria's integrity and anti-corruption system*, 2010, pp 33–34.

78 'Integrity of Government', Premier's Message, <http://premier.vic.gov.au/our-commitment/integrity-of-government/> (accessed on 5 March 2011).

79 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 21 March 2011, pp 1–2.

80 Mr Howard Whitton, Fellow, ANZSOG Institute for Governance, *Committee Hansard*, 21 March 2011, p 10.



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meaningful promotion of standards of integrity within it and federal agencies.<sup>81</sup>

3.109 Similarly, Professor AJ Brown and Mr Peter Roberts submitted that:

Currently there are very large areas of important Commonwealth public administration which are not subject to effective review and oversight in relation to the management of integrity risks and integrity breaches. While it is valid and sensible for the Commonwealth Parliament to prioritise those areas of activity which should be subject to closer scrutiny and oversight than others, the fact is that all agencies and departments should be included in these elements of the Commonwealth's overall integrity system.<sup>82</sup>

3.110 Reflecting on the 'Utgate affair' Professor Brown remarked:

This illusion that the Commonwealth is somehow magically better than the states is one of the reasons why it has been going backwards to the extent that it is there at a rate of knots.<sup>83</sup>

3.111 Mr Peter Bennett from Whistleblowers Australia also argued there is a need for a broad public sector integrity commission at the Commonwealth level, explaining that there are presently limited avenues for whistleblowers to take their concerns. Mr Bennett stated:

The question is: is there an issue of maladministration and corruption in the federal public sector and the answer is yes.

... As the president of Whistleblowers Australia I would have to get a call three times a week from people involved in the public sector saying, 'Things are going wrong and I do not know how to fix it.' Frankly I cannot tell them how to fix it either. All I can tell them is how to protect themselves from the damage that is likely to occur if they tell anybody about it. That is what I am limited to.<sup>84</sup>

3.112 Rodda Castle & Co submitted that parliamentary committees require an 'independent authority' with the status of a 'standing judicial commission' to which matters can be referred that have been brought to the committees' attention during the inquiry process and warrant further investigation.<sup>85</sup> The submission contains an example in which such an authority could have been used.

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81 Transparency International Australia, *Submission 13*, p. 1.

82 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, p. 2.

83 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 17.

84 Mr Peter Bennett, Whistleblowers Australia, *Committee Hansard*, 16 October 2009, pp 20–22.

85 Rodda Castle & Co, *Submission 19*, p. 3.

3.113 Mr Graham MacAulay, President of the Westpoint Investors Group, submitted that Commonwealth government agencies require integrity oversight and singled out the Australian Securities and Investments Commission in particular.<sup>86</sup>

3.114 Other witnesses, however, described the present integrity system as sufficiently robust. For example, the APSC stated:

The commission's position is that we do not believe the APS needs a full-blown state ICAC style anticorruption commission. The view has been that that would be overkill given that there are a number of agencies that already have jurisdiction in that component. Already we have found that there has not been the systemic corruption that has been the subject of what has happened in the state systems.<sup>87</sup>

3.115 The Merit Protection Commissioner, Ms Annwyn Godwin, noted that one of the key differences between the state and federal levels was the personal relationships that developed at the state level. By contrast, the Australian Public Service focused on national issues and as such experienced a more distant relationship with clients and stakeholders.<sup>88</sup>

3.116 Furthermore, the Public Service Commissioner was of the opinion that there was not enough evidence of the need for a broader Commonwealth integrity body to justify the presumably high costs of such a body's establishment.<sup>89</sup>

3.117 Mr Tim Smith, Chair of the Accountability Round Table argued the opposite, stating:

In looking at cost, we tend not to look at the cost of not doing it. As I discovered, the problem you run into immediately there is that it is very hard to cost, particularly when it goes undetected, as it often does. But consider the damage done to the reputation of government, of politicians, of public servants internationally and domestically by some of the matters that have been mentioned today. What price do you put on that? What effect does that conduct—and, in particular, the failure to do anything about it—have on community views about appropriate standards of behaviour in the community? These are significant costs, I suggest, and they need to be taken into account.<sup>90</sup>

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86 Mr Graham MacAulay, *Submission 7*, p. 1.

87 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 23.

88 Ms Annwyn Godwin, APSC, *Committee Hansard*, 14 August 2009, p. 22.

89 Mr Steven Sedgwick, APSC, *Committee Hansard*, 11 February 2011, p. 6.

90 Professor Tim Smith, Accountability Round Table, *Committee Hansard*, 11 February 2011, p. 46.

3.118 Professor John McMillan noted that while he does not see a need for a broad integrity commission such a development is inevitable:

It is foreseeable that at some time in the future the Commonwealth will choose to establish a broader integrity commission. I see that happening sometime in the future because it is happening more in the states. It will possibly happen in Victoria. We will wait to see the report of the committee that is looking at it. It has already happened recently in an initial way in Tasmania. When it has happened in all the states, it will be hard for the Commonwealth to resist the call to establish a broader integrity commission with a corruption focus.

The other reason I see it happening sometime in the future is because the Commonwealth in our region of the world has strongly argued that neighbouring countries should take similar steps in reviewing their integrity framework and consider this as an option, and that they should be guided by the principles in the United Nation Convention against Corruption. That said, I do not see any demonstrated need for it at this stage.<sup>91</sup>

3.119 The committee notes that since Professor McMillan appeared before the committee, Victoria has opted to establish a public sector integrity commission with jurisdiction over all Victorian public sector bodies, local government and state government officials.<sup>92</sup> However, there is uncertainty over the precise model that may be used in Victoria.<sup>93</sup>

#### *The right model for the Commonwealth*

3.120 The Department of Prime Minister and Cabinet advised that while it is aware of developments around the states it has not undertaken work on the development of such an anti-corruption mechanism at the Commonwealth level.<sup>94</sup>

3.121 The committee did receive some evidence concerning the best model for the Commonwealth. For example, Professor AJ Brown informed the committee that:

[I would] create a new general anti-corruption agency alongside ACLEI and alongside the Commonwealth Ombudsman's Office, or I would make it a division of the Commonwealth Ombudsman's Office. I would still give it jurisdiction over all Commonwealth agencies. I would not try to redraw the boundaries so that it was confined to non-law enforcement, because ACLEI was there to deal with law enforcement and that is just creating a gap within

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91 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 4.

92 'Integrity of Government', Premier's Message, <http://premier.vic.gov.au/our-commitment/integrity-of-government/> (accessed 5 March 2011).

93 Professor Tim Smith, Accountability Round Table, *Committee Hansard*, 11 February 2011, p. 48.

94 Department of Prime Minister and Cabinet, correspondence to committee secretariat (received 22 June 2010).

which things are going to be invited to fall. I would still give it a general jurisdiction and, therefore, use it as a catch-all backup...<sup>95</sup>

3.122 The Integrity Commissioner stated his preference that ACLEI remain a specialist agency in the event that broader public sector integrity oversight is introduced at the Commonwealth level in the future. Mr Moss explained that:

ACLEI has been going about 2½ years and has developed a focus and an expertise in its particular focused area. For the role of ACLEI to be something broader and to expand quickly to encompass a whole range of other agencies would virtually mean starting again. I do not think that ACLEI could absorb those additional responsibilities. It would be the wrong way to go about it, anyway. You would want to start afresh and start on a new premise, which is not the premise on which ACLEI was established.<sup>96</sup>

3.123 One suggestion introduced by the Attorney General's Department would be to merge ACLEI with the Commonwealth Ombudsman's Office. The Department stated:

[An] option would be to combine ACLEI with the Office of the Commonwealth Ombudsman to consolidate the Commonwealth's anti-corruption arrangements.<sup>97</sup>

3.124 However, this proposal was not endorsed by anti-corruption experts and practitioners. Professor AJ Brown noted there are risks in such an approach. In particular he pointed to the risk that the anti-corruption function could be pushed aside in order to direct limited resources to the Ombudsman primary function of complaint handling.

There are a number of implications for the idea of rolling ACLEI back into the Ombudsman's Office and I think there are a lot of dangers in that. Unless it is done as part of a very sophisticated strategy with quite a lot of legislative reform, and again unless it is done with a view to the design of the whole system, it is potentially a recipe for yet again giving the Ombudsman a specialist function and then in a few years time when the budget gets tight it starts to get absorbed and consumed by other complaint handling functions, which are always the great chewer upperer of resources in any Ombudsman's Office. There are all sorts of complexities. I would respond to that suggestion—having come late and somewhat inconsistently in the piece—from the Attorney-General's Department with a bit of scepticism.<sup>98</sup>

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95 Professor AJ Brown, *Committee Hansard*, 16 October 2009, p. 3.

96 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 7.

97 Attorney-General's Department, answer to question on notice, 14 August 2009 (received 12 October 2009), p. 3.

98 Professor AJ Brown, *Committee Hansard*, 16 October 2009, pp 5–6.

3.125 Professor John McMillan was able to reflect on this proposal from the perspectives of his role as former Acting Integrity Commissioner of ACLEI and former Commonwealth Ombudsman. Professor McMillan expressed the opinion that such a merger, while 'theoretically possible', would not work well in practice and gave three reasons as outlined below:

One is that there is a different skill set. Having worked in both agencies, I know that the skill set in the staff of the Ombudsman's office was quite different to the skill set in ACLEI. Of course the Ombudsman's office could acquire extra staff, but at the moment the skill set is different. ACLEI, in particular, has people with a lot more forensic investigation experience and a much closer understanding of law enforcement.

The second is that ACLEI has all of these intrusive and coercive powers. Until recently those were not exercised so it was more a theoretical issue about whether it could be combined, but as I understand it ACLEI at least has facilities and staff for exercising those functions. I understand from some things I have seen in the media that those functions are being exercised. They are not functions that are appropriate for an ombudsman's office, in my view.

Thirdly, of course the Ombudsman has a role in overseeing the exercise of those functions by ACLEI. The Ombudsman has a large auditing and monitoring role for the exercise by law enforcement agencies generally of telephone interception, controlled operations, electronic surveillance and so on. If the Ombudsman and ACLEI's functions were combined, there would be a need to create some other agency or oversight function.<sup>99</sup>

3.126 The committee agrees with the appraisals of Professors Brown and McMillan and does not consider that further attention should be directed to this option.

3.127 The question of a broad public sector integrity commission is tangential to the terms of reference for this inquiry. The committee considers, however, that it has received sufficient evidence indicating there is an oversight gap at the Commonwealth level to warrant further examination by this committee or another appropriate body.

3.128 For this reason, the committee recommends that the Australian Government conduct such an examination, including consideration of the following five issues as identified by Professor AJ Brown:

- how to bring all federal officeholders within a realistic scheme of integrity scrutiny;
- how to include senior officials such as ministers within the scheme;
- how to ensure that information about integrity breaches is rapidly transmitted to the place where most effective action can be taken;

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99 Professor John McMillan, *Committee Hansard*, 27 May 2010, p. 5.

- how proactive integrity-building and corruption resistance strategies, rather than reactive investigations into alleged integrity breaches, are best pursued and monitored across the public sector; and
- how the different integrity institutions are best to be coordinated.<sup>100</sup>

3.129 The committee notes the valuable expertise established by ACLEI in the area of corruption and law enforcement, and would see a continuing role for ACLEI in this area, either as a stand-alone agency or as a separate section within a broad-based Commonwealth integrity commission.

### **Recommendation 10**

**3.130 The committee recommends that the Australian Government conduct a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity commission with anti-corruption oversight of all Commonwealth public sector agencies, taking into account the need to retain the expertise of ACLEI in the area of law enforcement.**

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100 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, Attachment 1, p. 10.

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## Conclusion

### *Is the existing system enough?*

3.131 The committee is satisfied that the recommendations made in its interim report and this final report will significantly improve law enforcement integrity through the operation of the LEIC Act. In addition, several of the recommendations will, if adopted, begin to provide greater assurance of integrity across the Australian Public Service.

3.132 However, while the current efforts of agencies including the APSC, the Commonwealth Ombudsman, the ANAO and ACLEI contribute to Commonwealth integrity, the committee is left with the impression that more needs to be done.

3.133 This inquiry sought to examine the adequacy of the LEIC Act. However, in conducting the inquiry, the committee received evidence that suggested the need for anti-corruption measures that extend beyond narrowly defined law enforcement functions to all public sector agencies and actors.

3.134 The committee recognises that there is very little evidence of serious or systemic corruption in the Australian Public Service. However, it is also of the view that there is an insufficient detection capability. As the Premier of Queensland, the Hon Ms Anna Bligh MP, noted in a speech reflecting on that state's approach to integrity in the aftermath of the Fitzgerald inquiry:

Despite the inevitable embarrassment from time to time, I would much rather live and work in a system which is not afraid to pick up the rock and discover the ugliness underneath than one that is content to leave the rock alone and assume that an undisturbed rock is a sign of good health.<sup>101</sup>

3.135 In short, the committee agrees with an approach that assumes the existence of corruption in a system full of risks. In the present state of affairs, there could be a lot of 'undisturbed rocks' that need to be overturned if the public is to be fully assured that integrity in the public sector is being properly maintained and safeguarded.

3.136 For this reason, in addition to the recommendations proposed in this inquiry, the committee will remain seized of this issue in the future.

**Ms Melissa Parke MP**  
**Chair**

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101 The Hon Ms Anna Bligh MP, Premier of Queensland, *Australian Public Sector Anti-Corruption Conference Speech*, 29 July 2009, <http://www.thepremier.qld.gov.au/newsroom/2009/anti-corruption.aspx> (accessed 3 June 2011).

