



Australian Government
**Australian Commission for
Law Enforcement Integrity**

**SENATE SELECT COMMITTEE ON A
NATIONAL INTEGRITY COMMISSION**

Submission by the
Australian Commission for
Law Enforcement Integrity

7 April 2017



1. INTRODUCTION

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Senate Select Committee on a National Integrity Commission.

ACLEI is the only Australian Government agency dedicated solely to the prevention, detection, investigation and prosecution of corruption. With a focus on those agencies with law enforcement functions that operate in high-corruption risk environments, ACLEI has a special role in the Australian Government's anti-corruption framework.

To assist the Committee:

- Part 2 of this submission provides an overview of ACLEI, and
- Part 3 responds to the terms of reference, as relevant to ACLEI's role and responsibilities.

2. OVERVIEW OF ACLEI

Establishment

The office of Integrity Commissioner, and ACLEI, are established by the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). The objects of the LEIC Act (at section 3) are:

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

ACLEI's strategic purpose—through performance of functions prescribed by the LEIC Act—is to make it more difficult for corruption in law enforcement agencies to occur or remain undetected. The LEIC Act provides the basis for ACLEI's purpose and activities.

The LEIC Act agencies—the agencies subject to the Integrity Commissioner's jurisdiction under the LEIC Act—are:

- the Australian Criminal Intelligence Commission (ACIC)—including the Australian Crime Commission (ACC), the former CrimTrac Agency and the former National Crime Authority
- the Australian Federal Police (AFP), including Australian Capital Territory Policing
- the Australian Transaction Reports and Analysis Centre (AUSTRAC)
- prescribed aspects of the Department of Agriculture and Water Resources (DAWR), and
- the Department of Immigration and Border Protection (DIBP), including the Australian Border Force (ABF).
- Other agencies with law enforcement functions may be added by regulation.

ACLEI's role

ACLEI's primary role is to detect and investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. Subject to procedural fairness requirements, the Integrity Commissioner may make administrative findings about the conduct of individuals.

When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws or administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for changes.

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

Under section 71 of the LEIC Act, the Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following:

- a corruption issue or issues
- an issue about corruption generally in law enforcement agencies, or
- an issue or issues about the integrity of staff members of law enforcement agencies.

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Justice is responsible for ACLEI.

Impartial and independent investigations are central to the Integrity Commissioner's role. Although the Minister may request the Integrity Commissioner to conduct public inquiries, the Minister cannot direct how inquiries or investigations will be conducted.

The LEIC Act contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference and maintain an independent relationship with government agencies. Accordingly, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily
- is appointed for up to five years, with a maximum sum of terms of seven years
- can commence investigations on his or her own initiative, and
- can make public statements, and can release reports publicly.

Receiving and disseminating information about corrupt conduct

The LEIC Act establishes a framework whereby the Integrity Commissioner and the relevant agency heads can prevent and deal with corrupt conduct jointly and cooperatively. The arrangement recognises both the considerable work of the agencies in the Integrity Commissioner's jurisdiction to introduce internal corruption controls (including detection and deterrence-focussed mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staff members.

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency.

The LEIC Act also enables any other person—including members of the public, other government agencies or the Minister—to refer a corruption issue to the Integrity Commissioner.

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to receive information about any corruption issue involving an agency within the LEIC Act jurisdiction that may be identified by other integrity agencies or law enforcement agencies as a result of their telecommunications interception activities.

Special legislative arrangements make it lawful for ‘whistleblowers’ to provide information about corruption direct to ACLEI. The LEIC Act provides for ACLEI to arrange protection for witnesses.

The Integrity Commissioner may disclose information to the head of a law enforcement agency or other government agency if satisfied that it is appropriate to do so, having regard to the functions of the agency concerned.

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

To safeguard information—for instance to protect a person’s safety or reputation from unfair harm—the LEIC Act establishes comprehensive confidentiality requirements for ACLEI staff.

Investigation options

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

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

The Integrity Commissioner can choose from a range of options in dealing with a corruption issue. The options are to:

- investigate the corruption issue
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI) and to report findings to the Integrity Commissioner
- refer the corruption issue to the AFP (if the corruption issue does not relate to the AFP)
- investigate the corruption issue jointly with another government agency or an integrity agency for a state or territory, or
- take no further action.

Under the LEIC Act, the Integrity Commissioner must give priority to serious or systemic corruption. Section 27 of the LEIC Act also sets out criteria to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue. With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI’s direct involvement.

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

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

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act. In this way, ACLEI aims to pursue those investigations which are most likely to yield the highest strategic contribution to maintaining and improving integrity in law enforcement agencies.

Investigation powers

Due to the adverse consequences of law enforcement related corruption, ACLEI has access to a range of statutory law enforcement, coercive and other powers, including:

- coercive notices to produce information, documents or things
- summons to attend a coercive information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things (or else face criminal prosecution or action for contempt)
- intrusive information-gathering (covert)
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities
 - integrity testing (in relation to the ACIC, AFP and DIBP)
 - scrutiny of financial transactions, and
 - access to specialised information databases for law enforcement purposes
- search warrants
- right of entry to law enforcement premises and associated search and seizure powers, and
- arrest (relating to the investigation of a corruption issue).

Purpose of coercive powers

Investigations of law enforcement corruption often involve suspects and witnesses who are well-versed in law enforcement methods and therefore may be skilled in avoiding or countering them to avoid detection. For instance, counter-surveillance skills, the ability to conceal activities ('hide tracks') or the capacity to divulge confidential information to others ('tip-offs') may be the commodity that makes a criminal conspiracy possible or attractive to undertake.

A particular challenge in this context is to ensure that anti-corruption investigations are able to uncover the full network of people involved—for instance law enforcement officials and their criminal counterparts—rather than stop at the point of having identified a ‘bad apple’. It is also important to seek to gain contemporary information about what methods are being exploited to compromise systems, so that ‘target hardening’ can take place.

To help meet these challenges, Part 9 of the LEIC Act establishes arrangements for the Integrity Commissioner to use coercive information-gathering powers during an ACLEI investigation or joint investigation. These powers require a person to produce documentary evidence and/or appear as a witness and answer questions truthfully at a hearing. It is an offence not to comply with a coercive notice or summons, not to answer questions (even if to do so would tend to self-incrimination), not to answer truthfully, or otherwise be in contempt of ACLEI. The Integrity Commissioner may also issue a non-disclosure direction in relation to coercive notices, summonses and any information provided. This measure assists ACLEI to continue to investigate a matter covertly.

Coercive powers are an important part of the suite of investigation powers available to the Integrity Commissioner. ‘Notices to produce’—for instance, to obtain bank account details when warranted—assist ACLEI to build an intelligence picture. Hearings—particularly when combined with other law enforcement investigation methods—enable ACLEI to further investigations that might otherwise stall through lack of conventional investigation options.

Evidence given under compulsion may not be used against the person examined in a criminal prosecution of that person, but may be used in a disciplinary context or in civil proceedings to recover the proceeds of crime.

ACLEI’s resourcing

As per the 2016 Mid-Year Economic and Financial Outlook, ACLEI’s maximum average staffing level (ASL) for 2016–17 is 50 ASL. Presently, 37 of ACLEI’s positions are located in Canberra, with the remaining 13 located in Sydney. Some additional resources (people and specialist capabilities) are provided to ACLEI by other agencies in the context of joint investigations or taskforces. ACLEI also procures a number of specialist services, such as IT support and surveillance.

ACLEI’s operating budget for 2016–17 is \$11.374 million.¹

3. COMMENTS ON TERMS OF REFERENCE

Having regard to the Inquiry’s Terms of Reference, the following sections canvas key themes in institutional design.

ACLEI’s strategic approach to corruption—focus on risk and harms

Australia—unenviably—is one of the world’s most profitable markets for illicit drug importations. This situation places those agencies with law enforcement, border regulation, and anti-money laundering functions at increased risk of criminal infiltration and corrupt compromise by organised crime groups. These corruption risks have high potential impacts on individuals, Australian society and the economy. ACLEI’s jurisdiction has been extended on three occasions to take account of changes in risk.

¹ Portfolio Budget Statements 2016–17, Budget Related Paper No. 1.2, Attorney-General’s Portfolio, p 63, Table 2.1.

ACLEI's strategy is to prioritise its detection, disruption and deterrence efforts against high-impact risk themes—those areas of administration, regulatory or law enforcement activity that would be undermined significantly if corruption were to become established. This approach aligns with the LEIC Act which directs that the Integrity Commissioner must give priority to serious corruption and systemic corruption.

Accordingly, one of the most frequent targets of ACLEI's investigations is the threat of corruption-enabled border crime—including instances involving facilitation of the importation of illicit drugs or other contraband. A growing aspect of ACLEI's work is in other areas of border regulation, such as biosecurity and visa operations, where corruption can be used as a method to circumvent controls. The potential impacts of this form of corruption may vary—such as advancing the interests of one business entity over another for economic advantage (resulting from a bribe), or enabling money laundering to occur (as part of organised criminal activity).

ACLEI's legislative framework—protecting fairness

ACLEI's legislative framework ensures the careful and responsible deployment of special law enforcement and coercive powers. The decision to use a particular statutory power or method is based on both operational and legal considerations, relating to which method may best fit an investigation plan, having regard to privacy and other risk factors.

ACLEI has taken great care since its establishment in 2006 to institute internal governance systems that support the proper and proportionate exercise of the extensive powers that ACLEI has been granted by statute.

As is the case with similar agencies, ACLEI's approach to conducting hearings has been informed by jurisprudence, most recently including *R v Seller and McCarthy* (2013) 273 FLR 155 (*Seller and McCarthy*), *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*X7*), *Lee v NSW Crime Commission* (2013) 251 CLR 196 (*Lee No. 1*) and *Lee v R* (2014) 88 ALJR 656 (*Lee No. 2*). These cases deal with the right to a fair trial when coercive powers have been used.

Subsequently, the *Law Enforcement Legislation Amendment (Powers) Act 2015* amended both the *Australian Crime Commission Act 2002* and the LEIC Act to clarify the validity of post-charge hearings and other uses of information obtained through coercive means. For instance, the amendments authorise the use of derivative material, and specify the circumstances in which coercively-obtained material may be provided to a prosecutor.

Effective coordination in dealing with corruption

ACLEI plays a key role in the Australian Government's multi-faceted approach to combatting corruption.

As envisioned by the LEIC Act, ACLEI works in partnership with the agencies in its jurisdiction to curb corruption and ensure integrity in law enforcement. Cooperation between agencies can span all activities—from the joint investigation of information and allegations, to sharing expertise in corporate functions and training. Staff exchanges are also essential to the functioning of ACLEI—both to respond to fluctuations in the number and complexity of investigations, and to assist in building a sector-wide, professional cadre of anti-corruption specialists.

Seeking to raise awareness of risks

ACLEI captures and shares insights and observations gained from its investigation and intelligence-gathering functions as broadly as is appropriate. In particular, ACLEI identifies possible systemic vulnerabilities, and contributes to the corruption detection and prevention initiatives of law enforcement agencies. In these ways, ACLEI adds value to the agencies' own efforts to manage corruption risks and protect integrity.

Similarly, ACLEI works closely with other Australian Government agencies—particularly the Attorney-General's Department (AGD), which has policy responsibility for protective security, fraud, and anti-corruption—to share insights that might strengthen integrity arrangements more generally. A good example of this cooperation is a recent body of whole-of-government work on countering 'insider threat', led by AGD, and informed in part by ACLEI investigation outcomes.

State relationships

ACLEI also has much to gain by working closely with state agency counterparts and with state police forces. For instance, ACLEI's strategy of sensitising state agencies to the likelihood that their criminal intelligence records and investigations will hold incidental insights about the possible compromise of high-risk Commonwealth law enforcement activities is bringing actionable information to light. The longer-term benefit is that pathways will be established that will uncover new information about corruption and play a role in strengthening Australia's integrity arrangements more generally.

ACLEI conducts its formal relationships with state integrity counterparts under the framework of the Australian Anti-corruption Commissions Forum (AACF)—a regular summit meeting of anti-corruption agencies throughout Australia. ACLEI representatives also participate in the AACF sub-groups—including: the Executive Co-ordination Group (comprising senior executives), the Legal Forum (comprising legal officers) and the Corruption Prevention Practitioners Forum (consisting of corruption prevention experts).

Measuring outcomes

Corruption in law enforcement agencies can involve collusion between corrupt or compromised law enforcement officials and other people, including those with connections to organised crime—the so-called 'corruption handshake'. As a result, ACLEI's investigations may give rise to prosecutions of staff members of LEIC Act agencies, and they may also—particularly in the case of joint investigations—result in prosecutions of members of the public or employees of other government agencies.

Since ACLEI commenced in 2006, outcomes from ACLEI investigations have resulted in 33 successful prosecutions (two of which are under appeal), with another eight prosecutions still in progress.

ACLEI also aims to understand corruption and to prevent it. ACLEI convenes a regular *Community of Practice for Corruption Prevention* in which practitioners share insights and build professional networks. On a more specialised basis, ACLEI assists agencies with design of corruption prevention strategies, including developing risk assessments and control plans. Other corruption prevention initiatives include specialised vulnerabilities assessments, which draw together lessons and observations about potential weaknesses in agency operating environments.

ACLEI has also worked closely with LEIC Act agencies and AGD to introduce new integrity measures. For instance, in July 2015, drug testing programs were extended to the entirety of DIBP as part of a suite of integrity measures (responding to changes in DIBP's risk environment).

To date, 24 reports of concluded investigations have been provided to the Minister (see *Appendix A— List of Investigation Reports*). Unless suppressed for operational reasons, these reports are published in full on ACLEI's website. To the extent possible, the reports seek to contribute to the body of knowledge about how and why corruption occurs, and how it may be prevented.

Accountability and oversight of ACLEI

Having regard to its statutory powers, ACLEI is held accountable by a range of external bodies and measures.

Judges, Magistrates and the Administrative Appeals Tribunal

The authorities and powers of the Integrity Commissioner and ACLEI are generally open to review before the courts, as with any other government agency exercising law enforcement powers.

In addition, the following powers of the Integrity Commissioner require prior approval by a Judge, a Magistrate or a designated official of the Administrative Appeals Tribunal before they can be exercised:

- a search warrant (section 108 of the LEIC Act, Part 3–5 of the *Proceeds of Crime Act 2002*, or Part IAA of the *Crimes Act 1914* (Crimes Act))
- a warrant to use a surveillance device (*Surveillance Devices Act 2004* (SD Act))
- a warrant to intercept telecommunications or to gain access to stored communications (TIA Act)
- an order that a person deliver his or her passport to the Integrity Commissioner (section 97 of the LEIC Act), or
- an arrest warrant (section 100 of the LEIC Act).

Reports to the Attorney-General and the Minister for Justice

The use of certain powers requires reports to be made to the Attorney-General or the Minister with responsibility for law enforcement, as appropriate, and in some cases to the Parliament.

For instance, statutory reports are required under the following enactments:

- the SD Act
- the TIA Act
- Part IAB of the Crimes Act (controlled operations)
- Part IABA of the Crimes Act (integrity testing)
- Division 6, Part IAC of the Crimes Act (assumed identities), and
- Division 2, Part IACA of the Crimes Act (witness identity protection certificates).

Commonwealth Ombudsman

The Ombudsman's office may investigate concerns or complaints from the public about ACLEI, or the conduct of an ACLEI staff member.

ACLEI's records of its use of certain covert powers are also subject to inspection by, and report to, the Commonwealth Ombudsman. The Ombudsman is required to report six-monthly or annually to the relevant Minister (and in some cases to Parliament) on the comprehensiveness and adequacy of ACLEI's records relating to the use of these powers.

The records that are subject to inspection relate to powers exercised under the following legislation:

- the SD Act
- the TIA Act (including retained data), and
- Part IAB of the Crimes Act (controlled operations).

Parliamentary Joint Committee

The Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJC-ACLEI) reports to both Houses of Parliament on matters relating to ACLEI.

In accordance with the LEIC Act, the PJC-ACLEI monitors and reviews the performance of the Integrity Commissioner's functions, and examines each Annual Report and any special reports produced by the Integrity Commissioner. This external scrutiny gives ACLEI a valuable external view of each year's efforts and achievements, and a basis to inform improvements to its work.

ACLEI corruption issues

ACLEI staff members have a mandatory obligation to report corruption. The LEIC Act establishes a statutory framework for the Minister to deal with allegations or information about corrupt conduct relating to the Integrity Commissioner or to an ACLEI staff member (an 'ACLEI corruption issue').

Part 12 of the LEIC Act provides that an ACLEI corruption issue must be notified to the Minister for Justice for a decision on how it is handled. For instance, the Minister may appoint a Special Investigator, who may then use the coercive powers of the LEIC Act to investigate the matter.

On conclusion of an investigation, ACLEI must provide the Minister with a report containing any findings and recommendations. Particulars of ACLEI corruption issues (including summaries of investigation outcomes and any disciplinary outcomes) are required to be published in the Integrity Commissioner's Annual Report.

Other terms of reference

As an operational agency, ACLEI does not have a role in commenting on government policy that may fall outside of the Integrity Commissioner's statutory functions.

APPENDIX A—LIST OF INVESTIGATION REPORTS

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| Investigation Report 01/2017 | Operation Marlowe—A joint investigation into the conduct of an Australian Federal Police Protective Services Officer concerning information security |
| Investigation Report 01/2016 | Operation Galaxy—A joint investigation into the conduct of an Australian Crime Commission ICT staff member |
| Investigation Report 02/2016 | Operation Hadron—A joint investigation into the conduct of an Australian Crime Commission staff member concerning information security and a conflict of interest |
| Investigation Report 03/2016 | Operation Hudson—an investigation into the relationship between a known criminal and an unidentified law enforcement officer |
| Investigation Report 01/2015 | Operation Helix—A joint investigation into alleged drug use by Australian Customs and Border Protection Service ICT employees |
| Investigation Report 01/2014 | Operation Myrrh—An investigation into “private” illicit drug use by certain Australian Customs and Border Protection Service officers |
| Investigation Report 02/2014 | Operation Heritage (Final Report)—A joint investigation of alleged corrupt conduct among officers of the Australian Customs and Border Protection Service at Sydney International Airport [summary only] |
| Investigation Report 03/2014 | A joint investigation into the conduct of an Australian Crime Commission employee who avoided a drug test |
| Investigation Report 04/2014 | Operation Barden—An investigation into the supervision by the Australian Federal Police of a traveller with internally-secreted drugs |
| Investigation Report 01/2013 | Operation Iceland—An investigation into the conduct of an Australian Federal Police appointee in relation to a conflict of interest in procurement and official duties [Summary only] |
| Investigation Report 02/2013 | Operation Heritage (Interim Report)—A joint investigation of alleged corrupt conduct among officers of the Australian Customs and Border Protection Service at Sydney International Airport |
| Investigation Report 03/2013 | Operation Pentax—An investigation into the conduct of an Australian Customs and Border Protection Service officer in relation to unauthorised access to and disclosure of law enforcement information |
| Investigation Report 01/2012 | Operation Ashlar—An investigation into the actions of Australian Federal Police (Australian Capital Territory Policing) appointees concerning alleged “tip-offs” to a criminal and related integrity matters [summary only] |
| Investigation Report 02/2012 | Operation Foxtan—An investigation into doubts raised about the integrity of senior managers in the Australian Customs and Border Protection Service |
| Investigation Report 03/2012 | Operation Garan—An investigation into the conduct of an Australian Federal Police appointee in relation to unauthorised disclosure of information and the giving of testimonials |
| Investigation Report 01/2011 | Operation Buckler—An investigation into the actions of an Australian Federal Police (Australian Capital Territory Policing) appointee concerning the handling of controlled substances, and other integrity issues |

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| Investigation Report 02/2011 | Operation Comport—An investigation into the conduct of an Australian Federal Police (Australian Capital Territory Policing) appointee concerning his association with the manager of a prostitution enterprise |
| Investigation Report 01/2010 | An investigation into allegations about the Australian Crime Commission relating to the communication of information obtained under section 3E of the <i>Taxation Administration Act 1953</i> |
| Investigation Report 02/2010 | An investigation into allegations about the Australian Crime Commission relating to compliance with a Direction made under section 25A(9) of the <i>Australian Crime Commission Act 2002</i> |
| Investigation Report 03/2010 | Operation Fondant — An investigation into staff claims about misuse of position and certain other integrity matters in the Australian Crime Commission |
| Investigation Report 04/2010 | Operation Pentallon—An own initiative investigation into possible corrupt conduct in the Australian Federal Police, concerning an operational security breach |
| Investigation Report 01/2009 | An investigation into allegations about the Australian Crime Commission relating to unfair dismissal proceedings, and certain other integrity matters |
| Investigation Report 01/2008 | An investigation into allegations that brought into doubt the validity of aspects of an NCA investigation, including the collection of evidence concerning the activities of an established criminal network [summary only] |
| Investigation Report 02/2008 | An investigation into an allegation that the Australian Federal Police ‘tipped-off’ a Federal Member of Parliament about an impending search |