



Australian Government

Australian Commission for  
Law Enforcement Integrity

Our ref: 11/218

15 July 2011

Ms Julie Dennett  
Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Ms Dennett

I am writing in response to your invitation to the Integrity Commissioner, Mr Philip Moss, to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs' *Inquiry into the Crimes Legislation Amendment Bill (no.2) 2011*.

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to this Inquiry and I thank you for the invitation.

ACLEI's submission is attached. If you have any questions about this submission, please contact ACLEI's Director Strategic Support, Nick Sellars, on

Yours sincerely

Stephen Hayward  
Executive Director



**Australian Government**

**Australian Commission for  
Law Enforcement Integrity**

**Senate Standing Committee on Legal  
and Constitutional Affairs**

*Inquiry into the Crimes Legislation  
Amendment Bill (No. 2) 2011*

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

**15 July 2011**

## **1. Introduction**

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) *Inquiry into the Crimes Legislation Amendment Bill (No. 2) 2011* (the Bill).

This submission addresses Schedule 1 of the Bill, amending the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) and the *Customs Administration Act 1985* to include the Australian Customs and Border Protection Service (Customs and Border Protection) within the jurisdiction of the Australian Commission for Law Enforcement Integrity.

The Explanatory Memorandum to the Bill sets out the Government's policy basis for proposing these amendments to the Parliament. This submission aims to assist the Committee by providing more detailed and specific information.

Part 2 of this submission provides background about ACLEI's role and responsibilities and about the addition of Customs to the LEIC Act jurisdiction.

Part 3 provides ACLEI's comments, based on its experience, about the amendments proposed in Schedule 1 of the Bill.

## **2. Role and responsibilities of ACLEI**

### ***Establishment***

The office of the Integrity Commissioner, and ACLEI, are established by the LEIC Act.

The objects of the LEIC Act (at section 3) are:

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

Those agencies subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission, the Australian Federal Police and the former National Crime Authority. Customs and Border Protection was added to the Integrity Commissioner's jurisdiction by regulation from 1 January 2011.



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***Role***

ACLEI's primary role is to investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. ACLEI also collects intelligence about corruption in support of the Integrity Commissioner's functions.

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

ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or the administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed.

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

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

***Independence***

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Home Affairs and 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. Accordingly, the Integrity Commissioner:

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

***Receiving information about corruption***

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

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, irrespective of the source of that information (section 19).

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Also, the LEIC Act enables the Minister to refer corruption issues to the Integrity Commissioner (section 18), and any other person, including members of the public or other government agencies (section 23), may refer a corruption issue. In addition, the Integrity Commissioner may deal with corruption issues on his or her own initiative (s 38).

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* to receive information about any corruption issue involving an agency within the LEIC Act jurisdiction that may be identified by other integrity agencies or police forces 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.

### ***Investigation options***

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI's jurisdiction. The Integrity Commissioner is not expected to investigate every corruption issue that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner's role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed properly.

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

- investigate the corruption issue;
- investigate the corruption issue jointly with another agency;
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI);
- refer the corruption issue to another agency, such as a State integrity agency, the AFP, or another Government agency, for investigation; or
- take no further action.

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

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement, for example if an independent investigation were beneficial, or if the use of ACLEI's coercive investigation powers were desirable.

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.

### ***Investigation powers***

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be well-versed in law enforcement methods, and may be skilled at countering them in order to avoid scrutiny. As a consequence, ACLEI has access to a range of special law enforcement powers.

The key investigative powers available to the Integrity Commissioner and ACLEI are:

- notices to produce information, documents or things; and
- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things;



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- intrusive information-gathering (covert);
  - telecommunications interception;
  - electronic and physical surveillance;
  - controlled operations;
  - assumed identities;
  - scrutiny of financial transactions; and
  - access to specialised information databases for law enforcement purposes;
- search warrants;
- right of entry to law enforcement premises and associated search and seizure powers; and
- arrest (relating to the investigation of a corruption issue).

***Background to the addition of Customs and Border Protection to the LEIC Act jurisdiction***

In its Interim Report into the *Inquiry into the operation of the LEIC Act*, the Parliamentary Joint Committee on ACLEI made the following recommendations:

- (recommendation 2) that Customs and Border Protection be brought within jurisdiction on a whole of agency basis by regulation as an interim measure
- (recommendation 3) that Customs and Border Protection be prescribed as a law enforcement agency for the purposes of the LEIC Act.<sup>1</sup>

Government agreed to these two recommendations in September 2010 and added the law enforcement functions of Customs and Border Protection by regulation to the Integrity Commissioner's jurisdiction from 1 January 2011.

While still in its early stages, the relationship between ACLEI and Customs and Border Protection has been cooperative. The two agencies have worked in partnership to counter the risk of corruption in Customs and Border Protection.

In the first six months of the new arrangements:

- the Chief Executive Officer (CEO) of Customs and Border Protection notified the Integrity Commissioner of twenty corruption issues;
- ACLEI received four referrals of possible corruption issues from other sources, (which may include other government agencies, members of the public or whistleblowers);
- ACLEI commenced six investigations into these corruption issues, all of which are being conducted jointly with Customs and Border Protection<sup>2</sup>;
- Customs and Border Protection conducted several briefings to help ACLEI staff to become familiar with the range of the agency's operations and activities;

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<sup>1</sup> Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Interim Report, *Inquiry into the Operation of the LEIC Act*, February 2010

<sup>2</sup> Of the remaining eighteen corruption issues, nine were referred to Customs and Border Protection for internal investigation, five were closed after assessment and four remained under assessment at 30 June 2011. ACLEI will provide more detail on the disposition of corruption issues in the Integrity Commissioner's 2010-11 Annual Report.

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- The Integrity Commissioner and senior ACLEI staff have provided awareness-raising presentations to Customs and Border Protection Staff at site visits across the country; and
- Customs and Border Protection has taken a number of steps to inform its staff about ACLEI and its role, including the distribution of information leaflets and an all-staff media presentation, jointly developed between the two agencies.

The Integrity Commissioner considers that the number of notifications and referrals is not evidence of a problem of corruption in Customs and Border Protection. Rather, it is an indication of the agency's recognition of the corruption risks that accompany some of its activities, its commitment to dealing with corrupt conduct and its willingness to work in partnership with ACLEI.

### **3. Comments about the *Crimes Legislation Amendment Bill (No. 2) 2011***

ACLEI was consulted in the drafting of the Bill. ACLEI is confident that the amendments will support the Integrity Commissioner in providing assurance to Government about the integrity of the staff of Customs and Border Protection.

#### ***Prescription of Customs and Border Protection as a law enforcement agency for the purposes of the LEIC Act***

The Bill expands in the primary legislation what has existed since 1 January 2011 under the Law Enforcement Integrity Commissioner Regulations. Under those regulations, Customs and Border Protection falls within the Integrity Commissioner's jurisdiction, but (because of section 6(2) of the LEIC Act) only in relation to its "law enforcement function", as that term is defined in section 5(1) of the LEIC Act.

Accordingly, the present structure of the LEIC Act places within the Integrity Commissioner's jurisdiction corruption issues arising in:

- all functions of the law enforcement agencies named in the definition of that term, presently the Australian Crime Commission, the Australian Federal Police and the former National Crime Authority; and
- the law enforcement function of another agency that has been prescribed in the Law Enforcement Integrity Commissioner Regulations.

The primary object of Schedule 1 of the Bill is to move Customs and Border Protection from the second to the first group.

The staff of Customs and Border Protection operate with similar corruption-risks to the staff of the Australian Crime Commission and the Australian Federal Police. Accordingly, ACLEI supports the amendments of the Bill that bring the arrangements relating to the staff of Customs and Border Protection into line with the existing LEIC Act provisions relating to the staff of those agencies.

The amendment is also consistent with recommendation three of the Parliamentary Joint Committee on ACLEI's February 2010 Interim Report.

In addition, the Interim Report indicated the Committee's support for extending ACLEI's coverage to the whole of an agency within its jurisdiction, citing ACLEI's submission that:



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*Law enforcement may be only one of a number of functions and services delivered by an agency. However, administrative staff and other employees or contractors support, or have access to, the agency's law enforcement functions, information, decision-making powers, staff and systems. These staff may be soft targets and are as attractive and vulnerable to subversion or coercion by criminal groups as law enforcement personnel.<sup>3</sup>*

The Committee tabled its Final Report on 7 July 2011. In that report, the Committee recorded its support of an anti-corruption approach that targets the areas of highest corruption risk. One of these risks is that of 'displacement' where a strong integrity regime in one area may drive organised crime or corrupt officials to look for weaknesses in other areas<sup>4</sup>.

As indicated in the Explanatory Memorandum, Customs and Border Protection has a range of functions, not all of which are readily categorised as law enforcement. However, the staff of Customs and Border Protection are attractive targets for recruitment as facilitators and advisers to criminal groups due to the agency's role in countering organised crime at the border, for example by preventing the importation of illicit substances.

Staff who work in areas that support or interact with the law enforcement functions of Customs and Border Protection may, at various times, have access to information with value to organised crime, for example about scheduled cargo inspections, law enforcement methods or taskforce activities.

The amendments would allow the Integrity Commissioner to address corruption risk to law enforcement functions and outcomes by removing any doubt that the Integrity Commissioner could investigate corrupt conduct in any part of Customs and Border Protection, should it become necessary.

***Disclosure provisions***

Schedule 1 of the Bill amends the *Customs Administration Act 1985* to provide an exception from the general prohibition on disclosure in the case of disclosures for the purposes of the LEIC Act. This amendment reflects provisions that already exist in the *Australian Crime Commission Act 2002* (section 51) and the *Australian Federal Police Act 1979* (section 60A).

ACLEI considers that it is important to put beyond doubt that it would be lawful for Customs and Border Protection staff or former staff members to provide information direct to the Integrity Commissioner or ACLEI if they have a concern about suspected corrupt conduct within the agency, or if they are required to do so in the course of an investigation by the Integrity Commissioner. It is foreseeable that a lack of clarity in relation to this matter could inhibit referrals of information or allegations to the Integrity Commissioner of possible corrupt conduct or the thorough investigation of a corruption issue.

The amendment is also broadly consistent with recommendation 4 of the Parliamentary Joint Committee on ACLEI's Final report on the *Inquiry into the Operation of the LEIC Act*, which recommends that the LEIC Act be amended to ensure that secrecy and confidentiality provisions pertaining to law enforcement agencies within ACLEI's jurisdiction do not prevent the Integrity Commissioner from receiving information necessary to the investigation of a corruption issue.

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<sup>3</sup> Australian Commission for Law Enforcement Integrity, *Submission to the Inquiry into the Operation of the LEIC Act*, July 2009

<sup>4</sup> Australian Commission for Law Enforcement Integrity, *Submission to the Inquiry into the Operation of the LEIC Act*, July 2009, Annexure Two



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***Item 6 - Application***

Item 6 of Schedule 1 of the Bill ensures that the amendments capture all corrupt conduct engaged in both before and after they commence. The obligation of the CEO of Customs and Border Protection to notify the Integrity Commissioner of corruption issues only applies to those matters which come to his attention after commencement.

ACLEI notes that, in respect of its law enforcement functions, the Customs and Border Protection Service has been in ACLEI's jurisdiction since regulation took effect on 1 January 2011. At that time, the CEO of Customs and Border Protection notified the Integrity Commissioner of ten corruption issues. In the six months to 30 June 2011, Customs and Border Protection has notified the Integrity Commissioner of a further ten issues.

Accordingly, the Integrity Commissioner is satisfied that the provisions under item 6 of the Bill are sufficient to allow him to meet his obligations under the LEIC Act to provide assurance to government of the integrity of the agencies in his jurisdiction.