



Australian Government

**Australian Commission for
Law Enforcement Integrity**

**The Senate
Legal and Constitutional Affairs
Legislation Committee**

*Inquiry into the
Law Enforcement Legislation Amendment
(Powers) Bill 2015*

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

1 June 2015

**ACLEI Submission: *Inquiry into the Law Enforcement Legislation
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1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee. This submission relates to the Committee's *Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015*.

In summary, having regard to the integral part coercive powers play in the investigation of serious and systemic corruption in Commonwealth government agencies with law enforcement functions, ACLEI supports and welcomes the clarification of the law contained in the Law Enforcement Legislation Amendment (Powers) Bill 2015.

To assist the Committee, Part 2 of this submission provides background about ACLEI's role and responsibilities. Part 3 explains the current situation in terms of the Integrity Commissioner's coercive powers, dissemination of hearing material and use of derivative material in prosecutions and the proposed amendments to these key concepts in the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). Part 4 contains ACLEI's comments on the reasons for referral to the Committee.

2. Role and responsibilities of ACLEI

Establishment

The office of 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.*

The agencies currently subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission (ACC), the Australian Customs and Border Protection Service (ACBPS), the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the CrimTrac Agency, prescribed parts of the Department of Agriculture, and the former National Crime Authority.

From 1 July 2015 the Department of Immigration and Border Protection (DIBP)—incorporating the Australian Border Force—will join the integrity Commissioner's jurisdiction (when that department assumes the functions of the ACBPS).

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.

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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.

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 with law enforcement functions 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 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 (section 19).

The LEIC Act also enables any other person, including members of the public or 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* 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.

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Special legislative arrangements make it lawful for 'whistle-blowers' 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, having regard to the functions of the agency concerned, it is appropriate to do so.

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

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 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.

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. Under the LEIC Act, the Integrity Commissioner must also give priority to serious or systemic corruption.

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

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

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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

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be familiar with 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
- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things
- intrusive information-gathering (covert)
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities
 - integrity testing (in relation to the ACBPS/DIBP, ACC and AFP only)
 - 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).

It is an offence not to comply with notices, not to answer truthfully in hearings, or otherwise to be in contempt of ACLEI.

3. Coercive information-gathering powers

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. Indeed, their counter-surveillance skills or an ability to hide their tracks 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 (law enforcement officials and their criminal counterparts) rather than stop at the point of having identified a 'bad apple'. It is also important to try to gain contemporary information about what methods are being exploited to compromise systems, so that "target hardening" can then take place.

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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 or appear as a witness and answer questions truthfully at a hearing. It is an offence not to comply with a notice or summons, not to answer questions, or not to answer truthfully.

The Integrity Commissioner may also issue a confidentiality notice in relation to notices, summonses and any information provided. This measure assists ACLEI to continue to investigate a matter covertly.

The four year trend in the use of information-gathering powers is shown in the following table (the figures for 2014–15 are for the year to date, as at 29 May 2015):

Use of coercive information-gathering powers—four year trend to date

	2011–12	2012–13	2013–14	2014–15 (29 May 2015)
Notice to provide information or produce documents or things [s 75]	15	28	31	29
Summons to attend a hearing to give evidence and/or produce documents or things [s 83]	13	21	17**	5
Hearings conducted [s 82]	9	20	17	8***

* Of the recorded summonses:

- In 2011–12, two were revoked, and two were issued for hearings that were conducted in 2012–13.
- In 2012–13, one was revoked, and two were issued for hearings that were conducted in 2013–14, and
- In 2013–14, one was served but no hearing was conducted and one was issued for a hearing conducted in 2014–15.

** Three additional summonses issued by the Integrity Commissioner in 2013–14 were not served on witnesses, due to operational developments

*** Two of these hearings were second appearances on summonses issued in 2013–14 and continued after the first hearing

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—assist ACLEI to build an intelligence picture early in an investigation. Hearings then enable the Integrity Commissioner to obtain information that may not otherwise be available (primarily by providing protections against self-incrimination, but also by conducting hearings in a confidential setting).

Hearings—particularly when combined with other law enforcement investigation methods—enable ACLEI to further investigations that might otherwise be stymied through lack of investigation options. Hearings are an effective way of determining the full extent of corruption arising from a corruption issue in an efficient and timely way.

Post-Charge Hearings

The 2013 decision of the High Court of Australia in *X7 v Australian Crime Commission (2013) 248 CLR 92* raised doubt as to whether the LEIC Act permitted post-charge hearings to be conducted (noting the level of similarity between the ACC and ACLEI coercive examination/ hearing processes and the legislative provisions that establish and support those processes).

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Following the X7 decision, ACLEI's practice—where a person has been charged with an offence, whether corruption related or not—has been to await the finalisation of charges before summoning a person to attend a hearing. However, prosecutorial proceedings can sometimes be lengthy, particularly if the person contests the charges, engages in lengthy pre-trial argument and/or institutes appeals. This process could take months or years, at which time the trail of evidence is cold and potentially corrupt officers have remained undetected. Accordingly, the implied restriction upon post-charge hearings has the potential to delay and significantly inhibit law enforcement corruption investigations.

Proposed Amendments to Post-Charge Hearings

The Bill will clarify that the Integrity Commissioner may summons witnesses who have been charged with offences to attend a hearing and require them to answer questions about the subject matter of the offences. It will also allow the Integrity Commissioner to question witnesses who are the subject of current proceedings about confiscating the proceeds of crime.

ACLEI welcomes this clarification of the law and the addition of appropriate safeguards (see below).

Dissemination of Hearing Information

The dissemination of hearing information is currently governed in the LEIC Act by the use of section 90 non-publication directions, which may be issued by the Integrity Commissioner at the commencement and conclusion of a hearing to ensure the confidentiality of proceedings.

For instance, section 90 enables the Integrity Commissioner to direct that the following information must not be published, except in such a manner and to such persons as the Integrity Commissioner specifies:

- particular evidence given at a hearing; or
- the contents of a particular document, or a description of any thing, produced to the Integrity Commissioner at the hearing; or
- particular information that might enable a person who has given evidence at the hearing to be identified; or
- the fact that a particular person has given or may be about to give evidence at the hearing.

The Integrity Commissioner is also required to give a non-publication direction in certain circumstances—for instance, if he or she were satisfied that the failure to give such a direction might prejudice a person's safety or the fair trial of a person who has been, or may be, charged with an offence.

An offence of breaching a non-publication direction currently carries a maximum penalty of imprisonment for 12 months.

Proposed Amendments to Dissemination of Hearing Material

The Bill proposes amendments which will make explicit the circumstances in which hearing material may be disclosed to other persons, including to prosecutorial authorities responsible for the prosecution of the witness (see Item 29). The amendments are designed to ensure that the dissemination of hearing material does not prejudice the fairness of any trial of the witness.

The Bill also adds a layer of judicial supervision to the disclosure process if a disclosure is to occur post-charge or if a charge is imminent. The proposed amendments would require an order of the court before such material can be disseminated to the prosecutorial authority.

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This measure clarifies that the court remains responsible for overseeing the process relating to the prosecution of a person, and has the opportunity to scrutinise a particular area of decision-making that would otherwise have the potential to affect the fair trial of the witness.

Use of Derivative Material

The LEIC Act is silent on the use of any material gathered as a result of information obtained in a hearing (i.e. derivative material). Derivative material covers a range of different types of evidence—from material that would not have been obtained without a witness's evidence at hearing, to evidence that is gathered many steps after the witness was questioned at hearing—and may relate to information obtained about the witness, or about other people. The material can vary in sensitivity and importance to an investigation and/or prosecution.

Use of derivative material is an important investigation strategy for ACLEI, since it helps to uncover further evidence about corruption-enabled crime. However, the New South Wales Court of Criminal Appeal decision in *R v Seller and McCarthy (2013) 273 FLR 155* created some uncertainty as to when it would be appropriate or fair to use derivative material in a prosecution.

Proposed Amendments to Use of Derivative Material

The Bill proposes amendments that would enable the Integrity Commissioner, ACLEI and investigatory partners to continue to use hearing material to obtain derivative evidence relating to witnesses and others, and will set out the circumstances in which this material may be used in criminal and other proceedings against the witness (see Item 29).

Importantly, the Bill adds an additional layer of oversight to the disclosure process where the material to be disclosed has been derived from post-charge hearing material. The proposed amendments would require an order of the court before such material can be disclosed to the prosecutorial authority. This approach provides the court with a discretion to allow derivative material to be provided to the prosecution depending upon the circumstances of the case.

4. Comments on the Bill

Summary

Schedule 2 of the Law Enforcement Legislation Amendment (Powers) Bill 2015 focusses on clarifying the Integrity Commissioner's powers to conduct coercive hearings and implements safeguards to ensure that the coercive hearing process and the disclosure of derivative material does not affect the fair trial of a witness.

ACLEI welcomes the proposed amendments which will provide greater clarity about the hearing process and use of information obtained through that process.

Are powers being expanded?

No. The Bill does not give ACLEI any new coercive powers or expand current powers. Rather—having regard to the decisions and guidance of the High Court in relation to the fair trial principle—the measures restore, clarify and suitably restrain the Integrity Commissioner's coercive information-gathering powers to the way they were originally intended to operate.

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The Bill expressly empowers ACLEI to conduct post-charge hearings; specifically permits investigators to use hearing material to find admissible evidence for prosecutions; and places a structure of rules in place to enable the dissemination of hearing and derivative material to prosecutorial authorities in a way that will protect a person's right to a fair trial.

Are Hearing Powers effectively Judicial Powers?

No. An ACLEI hearing is expressly not able to be used to determine the guilt or innocence of a person. Hearings are an important investigatory tool used by ACLEI to further investigations into law enforcement corruption, and are proportionate to the challenge of that task.

The Bill does not propose any amendments that will change the character of the Integrity Commissioner's questioning powers in hearings, but rather put in place legislative boundaries around when hearings may be conducted and how the material obtained from a hearing can be used in a prosecution.

Are safeguards sufficient?

In ACLEI's submission, an appropriate balance has been struck that also retains and supports the operational objectives for which ACLEI was established. The Bill proposes a number of mechanisms to ensure that hearing powers (including dissemination and derivative use relating to hearing material) do not interfere with a witness' right to a fair trial. These measures include: prohibition (in some instances), through to increased judicial oversight and scrutiny (in others).