

Chapter 2

Expanding ACLEI's jurisdiction: a risk based approach

Committee findings in the interim report

2.1 This chapter deals with one of the main questions posed in the course of this inquiry: whether the list of agencies under ACLEI's jurisdiction should be expanded. The committee's interim report included significant analysis of this issue, supporting a recommendation, since accepted by the government, that the Australian Customs and Border Protection Service (Customs) be subject to the Integrity Commissioner's oversight.

2.2 The LEIC Act definition of 'law enforcement function' is very broad, with a large number of agencies and departments that could be considered to have a law enforcement function. Indeed, a list of potential agencies provided by the Attorney-General's Department included 12 departments or agencies that were members of the Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA), and 30 that had referred briefs to the Commonwealth Department of Public Prosecutions.¹ Using the 'law enforcement function' criteria could therefore result in a very large and diverse set of agencies becoming subject to ACLEI's jurisdiction.

2.3 In the interim report, tabled in February 2010, the committee instead supported ACLEI's suggested risk-based approach to determining jurisdiction.² This means that those agencies with the highest inherent corruption risk potential should be subject to ACLEI's oversight.

2.4 Such an approach circumvents the difficult task of establishing which Commonwealth agencies have a law enforcement function for the purposes of law enforcement integrity oversight. More importantly, ACLEI's risk management approach enables the application of measures (and resources) that are commensurate with the corruption risk. As ACLEI observed, such an approach to jurisdiction is consistent with the integrity model established by the LEIC Act—that is, 'one that seeks to match measures to risks, with an emphasis on cooperative partnership'.³

2.5 In adopting this approach, the committee recommended that, as an immediate measure, Customs be brought under ACLEI's jurisdiction, due to the high inherent corruption risk associated with the agency's law enforcement functions. This recommendation was accepted by the government, and came into effect in January 2011.

1 Attorney-General's Department, *Submission 12*, Attachment A.

2 See in particular, Chapter 2 of the Interim report.

3 ACLEI, *Submission 14*, p. 13.

2.6 Additionally, the committee considered whether ACLEI should be restricted to only considering corruption issues relating to the law enforcement functions of an agency within its jurisdiction. There was concern by some witnesses that extending ACLEI's attention beyond purely law enforcement issues may dilute the effectiveness of the Integrity Commissioner. However, defining limits could also unnecessarily increase the potential for gaps in oversight provided by ACLEI and other integrity and accountability agencies.

2.7 For these reasons, the committee recommended that the Integrity Commissioner be enabled to investigate any issue relating to alleged, suspected or anticipated corruption or corruption risk in any agency within its jurisdiction. However, the committee also recommended that a statutory requirement be included that ACLEI give priority to matters related to law enforcement functions.

2.8 The section below follows on from the analysis provided in the interim report, with further attention given to corruption risk and ACLEI's proposed three-tiered approach to jurisdiction.

Corruption risk

2.9 ACLEI describes corruption risks as the 'conditions' or 'precursors' that 'may give rise to a corruption issue'.⁴ The law enforcement environment is particularly vulnerable to corruption because of the high corruption risk involved in law enforcement-related activities, for example:

- dealing directly with criminals, such as informers and with organised crime groups;
- discretion over the investigation, charging and arrest of individuals;
- holding or having access to law enforcement data sources; and
- seizing and handling property, firearms and illicit drugs.⁵

2.10 Other corruption risks in the law enforcement environment include:

- misplaced loyalty, due to the strong bonds between law enforcement officers;
- noble cause, where officers break the rules to get the job done at any cost; and
- investigating the investigators, where corrupt officers are skilled in countering standard detection and investigation methods.⁶

4 *Annual Report of the Integrity Commissioner 2008–2009*, p. 61.

5 *Annual Report of the Integrity Commissioner 2008–2009*, p. 65.

6 *Annual Report of the Integrity Commissioner 2008–2009*, p. 65.

2.11 In annexure 2 of their submission, ACLEI provides a comprehensive list of examples of criteria for assessing the need for independent integrity oversight of Commonwealth law enforcement agencies. These criteria address the following five risk areas:

- influence and authority;
- type of work;
- working environment;
- operational risks; and
- organisational environment.⁷

2.12 As noted in the interim report, the committee supports an anti-corruption approach that targets the areas of highest corruption risk, as determined by the above factors. Such an approach is described in ACLEI's submission to the inquiry, where it proposes a tiered model of jurisdiction that matches the level of oversight with the level of corruption risk of a particular agency.

A tiered model for jurisdiction

2.13 ACLEI has proposed the categorisation of agencies into tiers of corruption risk, as a way of determining jurisdiction. This would provide a framework for tailoring anti-corruption oversight measures to the level of corruption risk.

2.14 The model includes three tiers:

- tier one applies to agencies with 'significant law enforcement functions' and 'high inherent corruption risks';
- tier two includes agencies with 'important law enforcement functions and lower inherent corruption vulnerability'; and
- tier three includes all other Commonwealth agencies.⁸

2.15 ACLEI's level and power of engagement with Commonwealth agencies would depend on the tier in which each agency resides.

2.16 Those in tier one would be in a mandatory relationship with ACLEI, identical to that already established under the LEIC Act. That is, the heads of those agencies are compelled by legislation to notify ACLEI of potential corruption issues. ACLEI, in turn, would be required to provide a corruption risk assessment, prevention and awareness-raising assistance. Customs, which has already been brought within ACLEI's jurisdiction, would be classed as a tier one agency.

7 ACLEI, *Submission 14*, Annexure 2, pp 29-31.

8 ACLEI, *Submission 14*, Annexure 2, p. 32.

2.17 The heads of tier two agencies would have the discretion to refer potential corruption issues to the Integrity Commissioner, could seek assistance with corruption risk assessments and would be provided with corruption prevention advice.

2.18 Tier three agencies, which would include all Commonwealth agencies that do not have a high or intermediate level of risk could request corruption prevention advice. This would potentially be provided on either a cost-recovery or fee-for-service basis. These agencies would have no formal or mandatory relationship with ACLEI, nor the ability to refer a corruption issue to ACLEI.

2.19 A table capturing the types of engagement between ACLEI and the three tiers, as proposed by ACLEI, has been reproduced at Appendix 3.

Committee view

2.20 The committee agrees with the three-tier model in principle, as it provides a mechanism by which ACLEI's powers and resources may be appropriately matched to the corruption risk of each agency.

2.21 In practice, the first tier (tier one) already exists, in the form of those agencies already prescribed under the LEIC Act, namely the AFP, ACC, former NCA and Customs. For reasons outlined in the interim report, the nature of the work undertaken by these agencies and the role each plays in disrupting serious and organised crime, naturally makes these agencies targets of value, and hence high risk agencies. While the committee sees the potential for certain other agencies to be subject to tier one oversight, it makes no further recommendation for this to occur at this stage. The committee believes that ACLEI should continue to focus on the agencies already within its jurisdiction.

2.22 However, the committee considers that the establishment of a second tier (tier two) of jurisdiction including other agencies would be desirable, for two reasons. Firstly, it would enable limited corruption oversight of medium-risk agencies, while preserving ACLEI's effectiveness and ability to manage with current resources. The committee believes that it is essential that ACLEI has appropriate resources commensurate with the task it is given. There is a danger present in expanding the number of agencies subject to ACLEI's jurisdiction under the terms currently provided for by the LEIC Act ('tier one' treatment under the proposed model). Overburdening ACLEI would reduce the effectiveness of ACLEI's current activities.

2.23 Secondly, the creation of a second tier would provide a means by which ACLEI can establish a relationship with other agencies with a law enforcement function. In addition to building resistance to corruption in these agencies through education, awareness raising and ongoing communication, ACLEI would develop a greater understanding of the corruption risk profile of tier two agencies. This would provide a growing knowledge-base that could prompt future revision of ACLEI's jurisdiction, including the movement of tier two agencies to tier one oversight.

2.24 For these reasons, the committee supports the amendment of the LEIC Act in order to establish a second tier of agencies subject to limited ACLEI oversight.

2.25 However, the committee notes that under the tiered model described by ACLEI in its submission, the Integrity Commissioner would not be able to commence an investigation or inquiry into a second tier agency on his or her own initiative.⁹ The committee does not support this limitation, and is of the view that the 'own initiative' investigation or inquiry provision should apply to second tier agencies. This would ensure that the Integrity Commissioner can act with independence in the public interest if there is strong suspicion of corrupt conduct in a second tier agency, while recognising that ACLEI's primary focus will remain on tier one agencies.

2.26 In the following section, the committee considers which agencies should initially be subject to second tier oversight.

Recommendation 1

2.27 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as to establish a 'second tier' to the Act. Agencies with a law enforcement function included in this second tier would be subject to limited ACLEI oversight, under which the head of an agency, or the minister responsible for the agency, may refer a corruption issue, on a voluntary basis, for consideration by the Integrity Commissioner. The Integrity Commissioner should also have the power to commence an investigation or inquiry into a corruption issue in a second tier agency on his or her own initiative.

Agencies that should be subject to tier two oversight

2.28 Based on the evidence provided during the course of this inquiry, the committee recommends that, at minimum, the Australian Tax Office, CrimTrac, the Australian Transaction Reports and Analysis Centre, the Australian Quarantine and Inspection Service and the Department of Immigration and Citizenship be included in a newly established tier two jurisdiction.

2.29 In making this recommendation, the committee does not allege the existence of widespread or serious corruption in these agencies. Indeed, the evidence provided to the committee suggests that these agencies already take their governance and accountability requirements very seriously. However, the mere potential for corruption in the important law enforcement functions of these agencies suggest the need for, at the very least, limited oversight by and regular communication with ACLEI.

9 ACLEI, *Submission 14*, p. 32.

2.30 In establishing the list of agencies that should initially be prescribed under a second, limited tier, the committee has used the risk criteria developed by ACLEI and outlined in its submission to the committee, noted above (see paragraph 2.11).¹⁰

2.31 Of particular importance to the committee, is the potential for the following agencies to be of value to serious or organised criminal networks. This includes the potential for what ACLEI describes as 'displacement'.¹¹ Displacement refers to a situation where agencies under a high integrity standard, such as the ACC or AFP, already subject to full ACLEI scrutiny, work with agencies of a lower integrity standard. This was described by Mr Nicholas Sellars, ACLEI, who stated:

We would also be looking at agencies that have a close interaction or cooperation with the ACC or AFP, to close off gaps in the integrity system that may arise from displacement—that is, if the Australian Federal Police and the Crime Commission have high standards of integrity and are very resistant to corruption and infiltration, then serious and organised crime may look for softer targets, so there is an interest there as well.¹²

CrimTrac

2.32 CrimTrac is the national broker of policing information and has significant data holdings from Commonwealth, state and territory police agencies. Given the central role of CrimTrac in supporting law enforcement initiatives across Australia, the committee deems it to be appropriate to include the agency in a limited oversight relationship with ACLEI.

2.33 CrimTrac informed the committee that the main corruption risk they had identified was the possibility that serious or organised criminal networks could infiltrate or approach staff members in order to obtain sensitive law enforcement information.¹³ Though this risk is potentially significant, the committee notes the existence of the CrimTrac Audit Log Integration Facility, which continually monitors staff access to CrimTrac data holdings.

2.34 In addition to this monitoring system, the committee was also informed that CrimTrac has robust governance arrangements in place, including accountability, responsibility and reporting mechanisms under section 65 of the *Public Service Act 1999*, an active risk and audit committee and a board of management comprising all of Australia's police commissioners and the Deputy Secretary of the Attorney-General's Department.¹⁴

10 See ACLEI, *Submission 14*, pp 29–31.

11 Mr Nicholas Sellars, ACLEI, *Committee Hansard*, 14 August 2009, p. 4.

12 Mr Nicholas Sellars, ACLEI, *Committee Hansard*, 14 August 2009, p. 4.

13 Ms Theresa Van Gessel, CrimTrac, *Committee Hansard*, 23 October 2009, p. 26.

14 Ms Theresa Van Gessel, CrimTrac, *Committee Hansard*, 23 October 2009, p. 25.

2.35 In addition, the Integrity Commissioner noted that CrimTrac, as a centralised agency with a high degree of internal control of staff, is in a lesser category of corruption risk, relative to larger agencies working across multiple workplaces such as Customs.¹⁵

2.36 CrimTrac has informed the committee that it would support moves to place it within ACLEI's jurisdiction, stating:

CrimTrac believes in conducting its functions and responsibilities in an open and transparent manner and that oversight by ACLEI will provide assurance and certainty to CrimTrac's stakeholders. CrimTrac is also aware of its obligations and responsibilities toward ACLEI should the [LEIC] Act be extended to include it.¹⁶

2.37 Given the value of the information held by CrimTrac to serious and organised criminal networks and the fact that it works closely with Commonwealth, state and territory police agencies, the committee considers that CrimTrac should be subject to a certain level of ACLEI oversight, and hence should initially be included in a second tier arrangement.

Australian Taxation Office

2.38 The Australian Taxation Office (ATO), while not a law enforcement agency, does have a significant law enforcement function and works closely with law enforcement agencies such as the ACC and AFP. Additionally, the ATO's key role in ensuring the payment of taxes naturally entails the transfer of significant amounts of money. For these reasons, the committee considers that the ATO should be subject to at least tier two oversight by ACLEI.

2.39 As Mr Paul Malone, Assistant Commissioner, ATO, explained, the main corruption risk faced by the ATO was the potential infiltration of the office, or influence on people within the office by organised criminal activity.¹⁷ Due to the value of the information held, the ATO is likely to be a target for infiltration, with similar risks identified in tax offices overseas.¹⁸

2.40 In addition to the intrinsic value of the information held by the ATO and its role in collecting revenue for the government, the ATO has a significant law enforcement function, investigating tax fraud and ensuring compliance with taxation legislation. In doing so, it works closely with law enforcement agencies, notably the ACC.¹⁹

15 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 17.

16 CrimTrac, *Submission 5*, p. 2.

17 Mr Paul Malone, ATO, *Committee Hansard*, 23 October 2009, p. 62.

18 Mr Paul Malone, ATO, *Committee Hansard*, 23 October 2009, p. 62.

19 Mr Michael Outram, ACC, *Committee Hansard*, 23 October 2009, p. 48.

2.41 Only a small proportion of ATO staff members are directly involved in the agency's law enforcement function. Of approximately 23 500 staff, 96 are directly engaged in investigating potential tax fraud.²⁰ A number of other tax officers undertake tax audits, and provide support to investigations in joint task forces with law enforcement agencies, such as Project Wickenby, an investigation into serious tax fraud.²¹

2.42 The ATO informed the committee that it has a robust internal fraud control capability and a strong integrity assurance framework. Additionally, the ATO is scrutinised by the Commonwealth Ombudsman and the ANAO, and employs an independent examiner in the form of the Inspector-General of Taxation.²²

2.43 The committee heard that the ATO's current integrity measures compare favourably with counterpart agencies overseas, specifically the United Kingdom and the United States of America.²³

2.44 The committee considers that it would be beneficial to include the ATO in a tier two oversight arrangement, particularly in light of the ATO's involvement in investigations targeting serious and organised crime. However, this raises the question of whether ACLEI's oversight should extend to the whole agency, or simply to its law enforcement functions.

2.45 As indicated above, the law enforcement activity of the ATO is small compared to the total functions of the agency.²⁴ The ATO informed the committee that if the agency was subject to ACLEI's oversight, they would prefer that this be limited to the high-risk law enforcement function of the agency.²⁵

2.46 However, the committee has previously considered that a whole-of agency approach is preferable, as it minimises the possibility that definitional issues may result in gaps or unintended barriers to investigation.²⁶ In the committee's interim report, it recommended that ACLEI be able to investigate any corruption issue or corruption risk in an agency within its jurisdiction, but that this provision include a statutory requirement to give priority to the investigation of matters relating to law enforcement functions.

2.47 The committee considers that ACLEI should also take a whole-of-agency approach to tier two agencies, including the ATO, while prioritising investigation of

20 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 60.

21 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 60.

22 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 64.

23 ATO, answer to question on notice, 23 October 2009 (received 25 October 2009).

24 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 64.

25 Mr Michael Cranston, ATO, *Committee Hansard*, 23 October 2009, p. 64.

26 See interim report, p. 12.

corruption risk and issues pertaining to law enforcement functions. Given that referral of corruption issues by the agency head would be voluntary under the tier two arrangement, and that other notifications of corruption issues are restricted to the Minister and staff whistleblowers, the committee believes that a whole of agency approach will be manageable. Furthermore, the committee would not want to restrict ACLEI from investigating a case of serious corruption within the ATO in the event that assistance is sought by the head of the agency or Minister.

AUSTRAC

2.48 The Australian Transaction Reports and Analysis Centre (AUSTRAC) is Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit. As such, AUSTRAC contributes to investigative and law enforcement work to combat financial crime and facilitate prosecution.

2.49 AUSTRAC informed the committee that it does not consider itself to be, nor is it recognised within the Commonwealth as being, a law enforcement agency. It did acknowledge, however, that it could be described as having important law enforcement-related functions.²⁷

2.50 The agency is subject to a number of integrity mechanisms, including the establishment of strong workplace culture, a Fraud and Corruption Control Plan and high level personnel vetting and physical security processes. The financial intelligence system itself is subject to a sophisticated audit trail mechanism. An Internal Auditor provides independent assurance that these controls are operating effectively. An independent Audit Committee is also responsible for reviewing AUSTRAC's risk management, internal control framework, external accountability and legislative compliance.²⁸

2.51 While cognisant of these existing integrity measures, the committee is of the view that AUSTRAC should be subject to limited ACLEI oversight for two main reasons.

2.52 The first is the attractiveness of the agency as a target for organised criminal networks as a result of the agency's role in monitoring and deterring money laundering and other potentially criminal financial activity. In response to a question on notice, AUSTRAC noted that the misuse of its information (including financial data) represents the greatest potential source of risk for corrupt conduct within the organisation.²⁹

2.53 Secondly, AUSTRAC regularly provides information to Commonwealth and state law enforcement agencies. AUSTRAC has Memoranda of Understanding with

27 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

28 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

29 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

the AFP, ACC and Customs facilitating the provision of financial intelligence. Additionally, AUSTRAC Senior Liaison Officers are out-posted to the AFP, ACC and Customs to provide training and analytical support to those agencies' operations.³⁰ As a result, the committee considers that there is a possible risk of 'displacement' where AUSTRAC may be targeted for infiltration in lieu of other law enforcement agencies already subject to ACLEI oversight.

Department of Immigration and Citizenship

2.54 Together with the ATO and Customs, the Department of Immigration and Citizenship (DIAC) is one of three agencies identified as being of high corruption risk by ACLEI.³¹

2.55 Ms Alison Larkins, First Assistant Secretary, DIAC, explained that the department's law enforcement functions fall into two broad categories, stating:

There are two groups of law enforcement functions; those that operate at the border and those that operate within Australia. I run the law enforcement functions that relate to onshore compliance. Officers in our network have the power to detain citizens and we also have investigative powers.³²

2.56 However, Ms Larkins noted that the main corruption risk within DIAC is likely to be in the granting of visas rather than law enforcement functions.³³

Looking at our work and using ACLEI...criteria for where risk lies, the work that is done in the compliance area and the decision to detain is now extremely well controlled both internally and externally. It is also a group activity so there is very little decision making that is not done with a lot of exposure. Also there are not a lot of benefits in that space. On release from detention you are usually released on a temporary visa for a short period. It is in the visa space and the citizenship space where there are significant benefits that you might get from within our department.³⁴

2.57 DIAC reported that there have been two substantiated cases of an official granting or expediting a visa in return for sexual favours or money in the last two or three years.³⁵ DIAC officials noted that the ability to request specialised assistance from ACLEI would be welcome and useful in some circumstances.³⁶

30 AUSTRAC, answer to question on notice, 9 May 2011 (received 6 June 2011).

31 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 6.

32 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 70.

33 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 70.

34 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 71.

35 Ms Alison Larkins, DIAC, *Committee Hansard*, 23 October 2009, p. 72.

36 Mr Benjamin Noyen, DIAC, *Committee Hansard*, 23 October 2009, p. 76.

2.58 The committee notes that a similar issue emerges as was discussed in the context of the ATO. Namely, enabling ACLEI to investigate potentially corrupt behaviour in areas of an agency that do not technically have a law enforcement function may dilute the focus of the Integrity Commissioner. As noted by the Integrity Commissioner, such an approach may lead to the introduction of a Commonwealth-wide integrity agency 'by stealth'.³⁷

2.59 Nevertheless, the committee considers that, while the LEIC Act should include a statutory requirement to prioritise the investigation of corruption issues relating to law enforcement, this should not prevent the investigation of serious non-law enforcement corruption issues where deemed appropriate by the head of the agency concerned.

Australian Quarantine and Inspection Service

2.60 The Department of Agriculture, Fisheries and Forestry (DAFF), through the Australian Quarantine and Inspection Service (AQIS), is responsible for managing quarantine controls at Australia's borders to minimise the risk of exotic pests and diseases entering the country. AQIS also provides import and export inspection and certification in relation to biosecurity. In 2010–11, AQIS staff represented approximately 3400 of DAFF's 5000 staff.³⁸

2.61 DAFF informed the committee that AQIS law enforcement functions are limited to the Investigations and Enforcement Program, which investigates alleged client breaches of AQIS legislation. DAFF noted that due to the relatively limited powers of investigators, the nature of the activities subject to investigation and the existence of supervisory review and monitoring, the potential for corruption is limited. DAFF informed the committee that there have been no matters of corruption relating to law enforcement activities undertaken within AQIS in the past 18 years.³⁹

2.62 The committee notes that AQIS also plays a key role in protecting Australia's border, specifically in relation to biosecurity. For example, AQIS officers are responsible for checking mail, screening passengers and inspecting containers for biosecurity risks.⁴⁰ Officers of the Investigations and Enforcement Program have developed an effective working relationship with Customs, working together on operations on a small number of occasions.⁴¹

37 Mr Philip Moss, ACLEI, *Committee Hansard*, 14 August 2009, p. 11.

38 DAFF, answer to question on notice, 9 May 2011 (received 24 May 2011).

39 DAFF, answer to question on notice, 9 May 2011 (received 24 May 2011).

40 DAFF, Annual report 2009–10, p. 116.

41 DAFF, answer to question on notice, 9 May 2011 (received 24 May 2011).

2.63 As a result, the committee is of the opinion that AQIS should also be subject to limited ACLEI oversight due to the proximity of AQIS inspectors to Customs activities and border security measures.

Recommendation 2

2.64 The committee recommends that ACLEI's second tier jurisdiction should initially comprise the Australian Taxation Office, the Australian Transaction Reports and Analysis Centre, CrimTrac, the Australian Quarantine and Inspection Service and the Department of Immigration and Citizenship.

2.65 The committee notes that some of the arguments it has used to justify the inclusion of certain agencies in a second tier of limited ACLEI jurisdiction could potentially be extended to cover other agencies in the Heads of Commonwealth Operational Law Enforcement Agencies group, or agencies that provide briefs to the Commonwealth Director of Public Prosecutions.

2.66 Additionally, it is possible that, in establishing a relationship with the named tier two agencies above, ACLEI may be provided with information that suggests that one or more of those agencies should be moved from tier two to tier one (i.e. full oversight under the terms of the current LEIC Act).

2.67 For this reason, the committee recommends that, if established, the operation of a second tier of jurisdiction, and the list of agencies therein, be reviewed after a period of two years from the date the amendment comes into force.

Recommendation 3

2.68 The committee recommends that the operation of a second tier in the *Law Enforcement Integrity Commissioner Act 2006* and the list of agencies prescribed in that tier be reviewed two years after initial establishment. This review should include consideration of whether any tier two agencies may more appropriately be subject to tier one prescription. Similar reviews should subsequently be conducted at two year intervals.

Tier three: corruption prevention assistance

2.69 As noted above, ACLEI's proposed model includes a third tier jurisdiction that includes all Commonwealth public sector agencies not considered to have an intermediate to high law enforcement corruption risk (and therefore not in tier one or tier two). These agencies would have no formal or mandatory relationship with ACLEI. Nor would agency heads have discretion to refer a corruption issue to ACLEI, even in a voluntary capacity. Tier three agencies may however request corruption prevention advice and awareness raising about corruption risks.

2.70 The committee agrees that ACLEI should have some involvement in the provision of corruption prevention advice and education about corruption risks to the broader public service. However, the committee does not consider that amendment of the LEIC Act to establish a third tier of jurisdiction is required to achieve this. Instead,

the committee explores a possible role for ACLEI in this regard in the next chapter, which deals with the broader Commonwealth integrity regime.

Prescribed agencies: by legislation or regulation?

2.71 ACLEI presently has jurisdiction over agencies prescribed within section 5 of the LEIC Act; that is, the ACC, the AFP and the former NCA. In addition, Customs is currently prescribed by regulation.⁴²

2.72 The committee received limited evidence on the question of whether ACLEI's jurisdiction should be extended to other agencies by regulation or legislation.

2.73 ACLEI expressed its support for existing arrangements to continue noting that they provide flexibility for the government and for ACLEI. ACLEI further claimed that there are sufficient mechanisms in place to protect the integrity of these arrangements.⁴³

2.74 The Attorney-General's Department commented on the benefits of existing arrangements:

Extension by regulation is a simpler, faster and more flexible way of extending jurisdiction than amending the LEIC Act itself. Parliamentary oversight is still exercised through the tabling and disallowance process.⁴⁴

2.75 Alternatively, Transparency International Australia submitted that the extension of ACLEI's jurisdiction should occur by 'legislative overhaul' and 'not by regulation'.⁴⁵

2.76 Professor AJ Brown and Mr Peter Roberts similarly argued that the extension of ACLEI's jurisdiction should be by legislation and not by regulation. They wrote:

A key part of the avowed purpose of having integrity agencies such as ACLEI is their institutional independence both from the agencies under scrutiny, and from political interference or instruction by the Government of the day. In practice, such an agency may cooperate closely both with agencies and with Government, but their ability to be seen to be independent when it counts is a crucial part of their legitimacy and *raison d'etre*.

In our view it remains undesirable that the Government should have the power to extend jurisdiction by regulation, as this suggests or acknowledges a degree of *ad hocery* in what the Government and Parliament consider to

42 Law Enforcement Integrity Commissioner Regulations 2006, s. 6; please note that the Crimes Legislation Amendment Bill (No. 2) 2011, currently before the Australian Parliament, would, if passed, prescribe Customs by amending the LEIC Act instead.

43 ACLEI, *Submission 14*, p. 12.

44 Attorney General's Department, *Submission 12*, p. 3.

45 Transparency International Australia, *Submission 13*, p. 4.

be the purpose of the agency. Flexibility is one thing, but ad hocery is undesirable.⁴⁶

2.77 Professor Brown qualified this view:

I do not see it as being a crucial issue provided, of course, that the foundational jurisdiction of ACLEI is extended to reflect its current core mission as being a law enforcement integrity agency body by including all of the relevant agencies that it should have within its jurisdiction.⁴⁷

2.78 The committee appreciates the point that an agency such as ACLEI should have 'a clear, legislated jurisdiction which everyone understands, and which does not change on the whim of the Executive'.⁴⁸ At the same time, the committee considers it critical that Government is able to be responsive to changing corruption risks particularly in an environment where rapidly evolving technologies open the law enforcement environment to new and changing corruption risks.

2.79 For this reason, while the committee encourages the government to establish ACLEI's jurisdiction through legislative amendment, the capacity to add agencies by regulation should be retained. This will enable the circumvention of delays potentially associated with legislative amendments.

Other amendments to the operation of the LEIC Act

2.80 In the committee's interim report, it made a number of recommendations regarding specific amendments to the LEIC Act. The committee looks forward to the Government's response to those recommendations. In addition to those recommendations, the committee also proposes the following two amendments to the LEIC Act.

Confidentiality provisions

2.81 ACLEI raised a further possible amendment to the LEIC Act during its appearance before the committee at a public hearing on 11 February 2011. Law enforcement agencies, including Customs, are subject to various secrecy and confidentiality provisions in legislation. Though this has not been a problem for ACLEI so far, the Integrity Commissioner informed the committee that it would be desirable to ensure that such secrecy and confidentiality provisions not interfere with ACLEI's ability to question staff in any of those agencies.

In our view the Customs Administration Act presents no problem but it would be convenient if the issue were put beyond doubt.

It also would apply in another context whereby there may be, say, a taskforce which involves some of the law enforcement agencies for which

46 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, p. 4.

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

48 Professor AJ Brown and Mr Peter Roberts, *Submission 15*, p. 4.

ACLEI is responsible, say Customs and the AFP, but other agencies' staff might also be in that taskforce. They in that context may observe a corruption issue which they would want to refer to the Integrity Commissioner but they may be barred from doing that by secrecy or confidentiality provisions of their legislation.⁴⁹

2.82 If secrecy and confidentiality provisions were able to override the investigatory powers of the Integrity Commissioner, the ability to uncover corruption would be significantly undermined. In particular, the committee notes that such a situation could act to undermine the public perception of integrity in law enforcement agencies. For this reason, the committee supports the Integrity Commissioner's suggested amendment.

Recommendation 4

2.83 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so as 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.

Appointment of the Integrity Commissioner

2.84 The committee notes that under the current provisions of the LEIC Act, an individual cannot be appointed to the position of Law Enforcement Integrity Commissioner for a period greater than five years. The committee considers that this does not provide sufficient flexibility for a situation where ACLEI is undergoing extensive change, or where there is an ongoing, serious investigation. The committee is of the view that such situations could warrant the extension of the Integrity Commissioner's appointment for a further maximum period of two years.

2.85 The committee therefore proposes an amendment to the LEIC Act to enable such an extension to take place. In order to ensure the appropriate oversight of such a provision, the committee recommends that the extension of the appointment of an Integrity Commissioner for a further two years would require the consent of both the Minister and the committee.

49 Mr Philip Moss, ACLEI, *Committee Hansard*, 11 February 2011, pp 16–17.

Recommendation 5

2.86 The committee recommends that the *Law Enforcement Integrity Commissioner Act 2006* be amended so that the period of appointment of the Integrity Commissioner may be extended once, beyond the five year period of appointment, for a period of up to two years by the Governor-General on recommendation of the Minister, with the approval of the committee. Any such extension to the period of appointment should apply only to a serving Integrity Commissioner and should be approved no less than three months before the expiry of the current period of appointment.