

CHAPTER 3

KEY ISSUES – ACLEI

3.1 This chapter considers the main issues and concerns raised in the course of the committee's inquiry in relation to the Law Enforcement Integrity Commissioner Bill 2006 (LEIC Bill) and the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 (Consequential Amendments Bill):

- the need for the proposed integrity commission;
- ACLEI's jurisdiction;
- powers and proceedings of ACLEI;
- relations and communications with other agencies;
- accountability and reporting; and
- the definition of 'corruption issue'.

Rationale

3.2 In his second reading speech, the Attorney-General stated that the LEIC Bill would establish a body to detect and investigate corruption in the AFP and ACC 'should it arise'.¹ The known incidence of corrupt behaviour in the AFP and the ACC is infrequent, however the establishment of ACLEI is expected to send a powerful message to members of the public, as well as AFP and ACC staff that corrupt behaviour will not be tolerated.

3.3 The objects of the LEIC Bill are listed in clause 3.

(1) The objects of this Act are:

- (a) to facilitate:
 - (i) the detection of corrupt conduct in law enforcement agencies; and
 - (ii) the investigation of corruption issues that related 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.

1 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 6; The Hon. Philip Ruddock MP, Attorney-General and Senator the Hon. Chris Ellison, Minister for Justice and Customs, 'Commonwealth to set up independent national anti-corruption body', Joint media release E73/03, 16 June 2004.

Integrity systems in Australia

3.4 In assessing the need for an integrity commission, it is important to place it in the wider context of integrity systems in the Commonwealth government.

3.5 According to Dr A.J. Brown, the creation of a new Commonwealth anti-corruption body would be 'the most significant reform to the framework of the Commonwealth's core integrity institutions in over 20 years'.²

3.6 The key investigation and review bodies at the Commonwealth level currently include the Commonwealth Ombudsman, Australian National Audit Office (ANAO), Australian Public Service Commission, the AFP, the ACC and the integrity mechanisms of the Commonwealth Parliament.³ In particular, the activities of the Commonwealth Ombudsman focus on the actions and decisions of Australian Government agencies – that is, ensuring 'administrative integrity'. The ANAO has responsibility for providing assurance to the Parliament on 'financial integrity' issues through its role to independently audit public sector administrative performance and accountability regimes. Dr Brown noted that achieving an effective balance between the roles of multiple integrity agencies can be a complex task.⁴

3.7 An identified gap in the Commonwealth's capacity to proactively address corruption issues and the ensuing need to establish 'a regime of rigorous external examination' gave rise to the decision to set up an anti-corruption body.⁵ This decision followed the establishment of bodies at the State level after various Royal Commissions into allegations of corruption identified similar gaps in their integrity systems. For the most part, these bodies have the power to investigate misconduct and corruption in the public sector and are also empowered to investigate organised crime.

Wood Royal Commission

3.8 The Royal Commission into NSW Police Service (1994-1997) – known as the Wood Royal Commission – had broad terms of reference, focusing on the investigation of corruption within the Service.

3.9 The Wood Royal Commission found that forms of corruption were occurring on a regular basis. Justice Wood argued that for some the nature of police work was in itself corrupting.⁶ He observed the powers given to police – such as carrying arms and

2 Dr A.J. Brown, *Submission 8 (Attachment C)*, p. 67; *Committee Hansard*, 27 April 2006, p. 3.

3 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 6.

4 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 5.

5 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 6.

6 The Hon. Justice James Wood, 8th *International Anti-Corruption Conference – The Papers*, 'Royal Commission into the New South Wales Police Service', paragraph 3.10, http://www.transparency.org/iacc/8th_iacc/papers/jwood.html (accessed 28 April 2005).

the use force – were very substantial powers that could be exercised 'in circumstances where the opportunities for temptation and corruption' were high.⁷

3.10 In addressing the problem, the Wood Royal Commission examined the existing framework for the detection of corruption. This was a critical issue given there was already an 'elaborate structure' in place in NSW designed to detect and punish corruption.⁸ The structure referred to included the internal investigation functions of the NSW Police Service, the Independent Commission Against Corruption (ICAC) and the NSW Ombudsman.

3.11 Justice Wood recognised the value of the work undertaken by the ICAC and the NSW Ombudsman on specific matters, but argued that their ability to fight corruption was limited. One limiting factor was the Ombudsman's inability to deploy coercive powers or to undertake proactive investigations, and the former reluctance of the ICAC to employ electronic surveillance and other similar techniques.⁹ It was argued that greater success in detecting corruption could be had through 'extensive use of coercive powers' and 'wide-based proactive inquiries, and electronic and physical surveillance'.¹⁰

The role of the Australian Federal Police and the Commonwealth Ombudsman

3.12 A further issue is the extent to which the creation of an integrity commission would duplicate the existing roles of the AFP or Commonwealth Ombudsman.

3.13 Some gaps in the capacity of both agencies to address the full spectrum of corruption issues were identified in the course of this inquiry and it was also argued, particularly by Dr Brown, that neither organisation is able to fulfil the objects of the LEIC Bill as stated at clause 3.¹¹ It is accepted that this is largely due to the nature and powers of the respective organisations.

3.14 The AFP is currently the Commonwealth's primary corruption investigator. In evidence, Commissioner Mick Keelty noted:

7 The Hon. Justice James Wood, 8th *International Anti-Corruption Conference – The Papers*, 'Royal Commission into the New South Wales Police Service', paragraph 3.10, http://www.transparency.org/iacc/8th_iacc/papers/jwood.html (accessed 28 April 2005).

8 The Hon. Justice James Wood, 8th *International Anti-Corruption Conference – The Papers*, 'Royal Commission into the New South Wales Police Service', paragraph 4.1, http://www.transparency.org/iacc/8th_iacc/papers/jwood.html (accessed 28 April 2005).

9 The Hon. Justice James Wood, 8th *International Anti-Corruption Conference – The Papers*, 'Royal Commission into the New South Wales Police Service', paragraph 4.3, http://www.transparency.org/iacc/8th_iacc/papers/jwood.html (accessed 28 April 2005).

10 The Hon. Justice James Wood, 8th *International Anti-Corruption Conference – The Papers*, 'Royal Commission into the New South Wales Police Service', paragraph 4.4, http://www.transparency.org/iacc/8th_iacc/papers/jwood.html (accessed 28 April 2005).

11 Dr A.J. Brown, *Submission 8*, p. 4; Dr A.J. Brown, *Submission 8 (Attachment A)*, pp 3-5.

Part of the core business of the AFP – our remit – is to investigate and apply the fraud control policy of the Commonwealth to other Commonwealth agencies.¹²

3.15 Nevertheless, the usefulness of this role is limited in that the Commonwealth's fraud control guidelines have defined 'corruption' only as a subset of the term 'fraud'.¹³ Dr Brown argued that the AFP 'is restricted to its primary brief of criminal investigation' and he stressed that many 'grey areas' existed as a result of non-criminal forms of corruption that were not being appropriately detected and rectified.¹⁴

3.16 From the AFP's perspective, the establishment of a body such as ACLEI is positive for two reasons: it would act as a deterrent for people considering engaging in corrupt activity; and it would increase the public's confidence in the AFP as an organisation.¹⁵

3.17 Similarly, the Commonwealth Ombudsman is a generalist body that is more reactive – it is limited in its capacity to conduct in-depth investigations and it relies heavily on complaints as information sources. Corruption prevention and integrity enhancement is generally a secondary activity; though it must be acknowledged that this limitation lies in the nature of the office rather than any shortcomings in the Ombudsman, who will provide support for ACLEI, similar to the role provided by the NSW Ombudsman and the ICAC for the NSW Police Integrity Commission (PIC).¹⁶ In particular, the Ombudsman's investigative powers are limited by the lack of access to the suite of special investigative powers discussed in the section below.

3.18 In supporting this view, Dr Brown argued that 'corruption is different to maladministration, as dealt with by the [O]mbudsman'.¹⁷ He also argued that the Commonwealth Ombudsman 'should not be the chief agency responsible for investigating corruption allegations'.¹⁸

Corruption prevention role

3.19 Dr Brown questioned whether the corruption prevention (or 'corruption hardening') role set out in the objects section of the Bill is adequately reflected in the Bill's wider provisions.

12 *Committee Hansard*, 27 April 2006, p. 30.

13 Dr A.J. Brown, *Submission 8*, p. 4.

14 *Committee Hansard*, 27 April 2006, pp 5-6.

15 *Committee Hansard*, 27 April 2006, p. 29.

16 Dr A.J. Brown, *Submission 8 (Attachment B)*, p. 92.

17 *Committee Hansard*, 27 April 2006, p. 6; Mr Bruce Barbour, *The Ombudsman and the rule of law*, AIAL Forum, No. 44, 6 November 2004.

18 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 5.

3.20 The Bill clearly envisages that in addition to its detection and investigation roles, ACLEI will have a corruption prevention role.¹⁹ As Dr Brown argued:

This objective ... is frequently identified as distinguishing the mandates of the newer anti-corruption bodies from the complaint-handling work of the older integrity bodies, especially Ombudsman's offices.²⁰

3.21 In evidence, Dr Brown argued that a major issue was whether ACLEI could realise its object of being proactive in dealing with the detection and the prevention of corruption rather than just with the investigation of corruption, particularly because since, in his view, there is currently an inconsistency between the objects of the LEIC Bill (clause 3) and the functions of the Integrity Commissioner (clause 15).

The question is: why include them [detection and prevention] in the objects of the [Bill] if in fact you are not attempting to achieve them through the body of the legislation.²¹

3.22 Dr Brown stressed the importance of integrity bodies – such as ACLEI – being proactive in addition to relying on referrals from external sources to identify matters for investigation.²²

Committee view

3.23 Commonwealth bodies are no more immune to corruption than their State counterparts and the potential for corruption provides strong justification for the establishment of an anti-corruption body as a pre-emptive measure (rather than waiting for the circumstances that demand it). The committee believes that ACLEI's formation provides the mechanisms for ensuring earlier detection of corruption, as well as appropriate avenues for prevention and investigation – a role that cannot be performed by the AFP or the Commonwealth Ombudsman.

3.24 As such, the committee strongly endorses the purpose of the Bill and the associated objectives of the proposed commission.

3.25 The committee is also mindful that the Bill has a strong emphasis on ACLEI's investigation and prosecution functions which may perhaps constrain activities that are aimed at prevention measures.²³ Consistent with the objective of paragraph 3(1)(c), the Commission once operational should keep in mind the corruption prevention aspect of their role and allocate appropriate resources to this function.

19 Law Enforcement Integrity Commissioner Bill 2006, subclause 3(1).

20 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 3.

21 *Committee Hansard*, 27 April 2006, p. 8.

22 Dr A.J. Brown, *Submission 8 (Attachment B)*, p. 92.

23 Mr Glenn Ross, *Submission 1*, p. 1.

Jurisdiction

3.26 The LEIC Bill establishes ACLEI as an independent body designed to prevent, detect and investigate corruption in the AFP and ACC. These two bodies play a key role in Commonwealth law enforcement and it was argued that a regime of 'rigorous external examination' would ensure continuing confidence in their integrity.²⁴ As foreshadowed by the Attorney-General, other Commonwealth law enforcement agencies may be brought within ACLEI's jurisdiction by regulation.²⁵

3.27 In announcing that the Commonwealth would establish an independent anti-corruption body, the Minister for Justice and Customs said:

While no evidence exists of systemic corruption within the Australian Crime Commission (ACC), the Australian Federal Police (AFP) or other Commonwealth law enforcement agencies, the Government has decided there should be an independent body with the powers of a Royal Commission to address corruption at the Federal level should it arise.²⁶

3.28 As a representative from the Attorney-General's Department explained to the committee:

The government has decided that the ACLEI will initially look at the AFP and the ACC. But they have provided the capacity to expand its functions or its oversight arrangements to cover other agencies involved in law enforcement operations at a later date, and to do that by regulation, which is obviously quite a simple means.²⁷

3.29 Two issues emerge from this proposal: first, the limited jurisdiction of the proposed commission, albeit temporarily, to two agencies; and second, the limitation of the jurisdiction to law enforcement agencies, rather than creating a jurisdiction over Commonwealth agencies generally.

A wider law enforcement jurisdiction

3.30 The LEIC Bill provides that other Commonwealth law enforcement agencies would, if prescribed by regulation, fall within paragraph (d) of the definition of 'law enforcement agency' (clause 5). However, as currently drafted, the definition of 'law enforcement agency' is limited so that many agencies with investigative arms or law enforcement functions are excluded.

24 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 6.

25 *House of Representatives Hansard*, 29 March 2006, p. 6.

26 The Hon. Philip Ruddock MP, Attorney-General and Senator the Hon. Chris Ellison, Minister for Justice and Customs, 'Commonwealth to set up independent national anti-corruption body', Joint media release E73/03, 16 June 2004.

27 Mr Craig Harris, Assistant Secretary, National Law Enforcement Policy Branch, Criminal Justice Division, Attorney-General's Department, *Committee Hansard*, 27 April 2006, p. 30.

3.31 No rationale has been advanced for this potential expansion of jurisdiction by stages via regulation. Dr Brown accepted that although the AFP and ACC possessed powers and corruption risks that require additional scrutiny, no logical reason is provided to justify the exclusion of other agencies with law enforcement functions from ACLEI's oversight.²⁸

It would certainly be an improvement...to identify a broader range of agencies[.] What that range of agencies would be would obviously need to be open to more debate.²⁹

3.32 Since the Bill explicitly envisages ACLEI having jurisdiction over a wider range of law enforcement agencies, it is arguable that this jurisdiction should be granted from the beginning. Several factors support this view.

3.33 First, the breadth of agencies that possess and operationally deploy powers that have traditionally been characterised as police powers, has grown substantially in the past decade. Examples of such agencies include the Australian Customs Service, the Australian Taxation Office (ATO) and the Department of Immigration and Multicultural Affairs (DIMA).

3.34 These agencies have some or all of: the powers of arrest or detention; access to search warrants; telecommunication interception warrants; stored communications warrants; controlled operations; and controlled deliveries. As Dr Brown stated:

... the investigation and enforcement functions of the Australian Customs Service, Australian Taxation Office and Commonwealth Department of Immigration are at least as extensive and sensitive, certainly in their direct impacts on businesses and communities.³⁰

3.35 Commissioner Keelty also acknowledged:

There is a gap here – and I do not want to name agencies – if you look at the powers, such as access to search warrants, access to the use of firearms and access to detention.³¹

3.36 Second, the growing access by the wider community of law enforcement agencies to law enforcement intelligence and information networks arguably increases the scope for corrupt activities through improper access and use of this information. These networks contain a substantial range of information covering individuals, companies, relationships, and the results of investigations and intelligence operations.

28 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 96; *Committee Hansard*, 27 April 2006, pp 6-7.

29 *Committee Hansard*, 27 April 2006, p. 7.

30 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 96; *Committee Hansard*, 27 April 2006, pp 6-7.

31 *Committee Hansard*, 27 April 2006, p. 30.

3.37 Finally, the cost effectiveness of ACLEI's limited oversight role was also raised by Dr Brown and the Police Federation of Australia,³² who suggested that an agency with such a limited jurisdiction may never gain the 'critical mass' of expertise or activity to properly fulfil its role or justify its costs.

A general jurisdiction over all Commonwealth bodies

3.38 The second issue is whether it would be preferable to create a Commonwealth integrity commission with general jurisdiction over all Commonwealth agencies rather than jurisdiction limited to law enforcement agencies.

3.39 The Attorney-General's Department maintained that such a broader jurisdiction is not necessary, because the AFP has responsibility for investigating corruption in Commonwealth agencies, while other means of oversight are in place for the relevant agencies to address non-corruption issues.³³ As such, the AGD suggests that there is no 'accountability gap' for a more broadly focused Commission to address.

3.40 However, as discussed in the preceding section, there are limits to the effective jurisdiction of the AFP in relation to broader corruption or integrity issues that fall short of criminal behaviour.³⁴ This lacuna may not be adequately addressed by relying on agencies' internal investigations or the Ombudsman. Dr Brown argued:

The Commonwealth Ombudsman has dabbled in major corruption investigations, but with mixed success, especially given the constant pressures on its resources from other more consumer-based complaint handling roles.³⁵

3.41 Several reasons were advanced in support of giving the Commission a broader mandate to uncover corruption across the entire Commonwealth public sector.³⁶

3.42 As Dr Brown argued, 'Commonwealth administration is no more inherently immune from corruption risks than equivalent types of officialdom elsewhere'.³⁷ As such, he strongly supported the establishment of an anti-corruption commission with jurisdiction over all public officials, not just police. He cited NSW as a variation on this theme, having supplemented the ICAC with the PIC.³⁸

3.43 In relation to the proposed jurisdictional model, Dr Brown stated:

32 Police Federation of Australia, *Submission 7*, p. 4.

33 Mr Craig Harris, *Committee Hansard*, 27 April 2006, p. 29.

34 Dr A.J. Brown, *Submission 8*, p. 4.

35 Dr A.J. Brown, *Submission 8*, p. 4.

36 Dr A.J. Brown, *Submission 8 (Attachment B)*, pp 92-93 and p. 96.

37 Dr A.J. Brown, *Submission 8 (Attachment A)*, p. 96.

38 Dr A.J. Brown, *Submission 8*, p. 2.

The limited jurisdiction of the Commonwealth body [ACLEI] will leave the Commonwealth framework in much the same shape as the current Victorian framework, which was one that the Government was specifically criticising when trying to take this initiative in June 2004.³⁹

3.44 Second, Commissioner Keelty pointed to the danger of a 'displacement factor' arising as a direct consequence of a limited jurisdiction:

If you have an oversight or governance regime in a particular place then you need to expect that if you tighten it up in one area displacement may create a problem for you in another area.⁴⁰

3.45 Third, a body with general jurisdiction avoids the potential for pointless jurisdictional disputes between investigative agencies. Dr Brown cautioned that any attempt to 'bifurcate' between 'law enforcement' functions and non-law enforcement functions of agencies could become operationally problematic. He maintained that some agencies might use the 'law enforcement' distinction to avoid scrutiny of a corruption matter even when the Government feels it desirable to initiate an inquiry.⁴¹ As a general principle, any 'greyness' in the jurisdiction of the Commission is likely to introduce an undesirable layer of political discretion into the decision to investigate allegations, and undermine the perceived integrity and independence of the Commission.

Committee view

3.46 The committee strongly believes that the establishment of ACLEI is a positive opportunity for dealing with allegations of corruption and improving the integrity of the law enforcement system. ACLEI is the first body of its kind at the Commonwealth level and the committee expects that ACLEI will work collaboratively with the AFP, the ACC and the Commonwealth Ombudsman to oversee a comprehensive anti-corruption regime.

3.47 The committee acknowledges that the proposed legislation envisages a broader anti-corruption role for ACLEI in the future, and that it may be one of the Bill's strengths in that it allows for other Commonwealth agencies with law enforcement functions to be added to ACLEI's jurisdiction. While unstated in evidence, this may have operational advantages for the Commission, allowing a more gradual widening of its jurisdiction in line with its developing expertise, experience, capabilities and resources.

3.48 Nevertheless, the committee considers that there is a strong rationale for ensuring that a wider group of law enforcement agencies are brought within its jurisdiction, including Customs, the ATO and DIMA. In the committee's view, it

39 Dr A.J. Brown, *Submission 8*, p. 2.

40 *Committee Hansard*, 27 April 2006, p. 30.

41 Dr A.J. Brown, *Submission 8*, p. 3; *Committee Hansard*, 27 April 2006, p. 7.

would be useful for the government to give a public indication of the proposed timetable for this process.

3.49 It is also the view of the committee that it is undesirable that the jurisdiction of the proposed ACLEI be determined by regulation rather than legislation. While it is accepted that the regulatory mechanism proposed by the Bill would be faster and more convenient to the government than affecting change by legislation, the committee considers that the matter of jurisdiction is fundamental to the nature of ACLEI. As such, it is a matter that should properly be dealt with by legislation.

Recommendation 1

3.50 The committee recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended such that changes to the agencies subject to the Commission's jurisdiction are made by legislation, rather than regulation, as is currently provided for in paragraph (d) of the definition of law enforcement agency.

3.51 The committee also considers that a Commonwealth integrity commission of general jurisdiction is needed, and there is an accountability gap that would be closed by such a body. While the committee considers that ACLEI – as currently proposed – needs to be created, consideration should also be given to developing such a commission in the longer term.

Powers and proceedings of ACLEI

3.52 This section examines the mechanisms and powers available to ACLEI to deal with complaints and investigation.

3.53 The Integrity Commissioner has a broad general discretion granted by clause 26 to deal with a corruption issue by investigating it him/herself, or referring the issue to a law enforcement agency. Where a matter is referred, the Commissioner may also choose to 'manage' or 'oversee' the investigation.

3.54 If the Commission is to conduct the investigation itself, it has a suite of investigative powers closely analogous to those of a Royal Commission, or the ACC. These include the authority to apply for search warrants, telephone intercept warrants and warrants authorising the use of surveillance devices. ACLEI will also be able to undertake controlled operations.

3.55 The Integrity Commissioner will be required to keep records for inspection and report by the Commonwealth Ombudsman. The committee notes that this is consistent with the requirements which apply to the AFP and the ACC.

3.56 The 'Royal Commission' powers also include the use of coercive powers to require attendance at a hearing, and compel the answering of questions and production of documents. This power overrides the privilege against self-incrimination, subject to limitations on the use of the material so acquired (clause 96).

3.57 Such investigations may also be done by means of a public or private inquiry (clause 82).

3.58 In relation to coercive powers, the committee notes that the availability of such powers was crucial to the success of the Wood Royal Commission. Justice Wood particularly refers to the importance of the power to compel witnesses to give evidence and produce documents, and to enter relevant premises to inspect and copy documents.⁴²

3.59 Mr Allan Kearney, the Director of Intelligence and Executive Services at the NSW Police Integrity Commission, supported this view, telling the committee that coercive powers to investigate corrupt police officers were essential because of the inherently difficult nature of the work.⁴³

Corrupt police officers are aware of the strategies that are available to you, having probably used them themselves on many occasions beforehand. They are very difficult people to investigate. I think that any reasonable power that can be made available to an agency involved in this kind of work can and should be coercive.⁴⁴

3.60 The committee supports the use of coercive powers to detect corruption, particularly in light of the fact that ACLEI will be required to investigate officers in law enforcement agencies who are experienced in investigative practices and, by implication, the ways to avoid detection.

3.61 However, several aspects of the powers and proceedings proposed for the Commission are commented upon below.

Powers of 'authorised officers'

3.62 The LEIC Bill enables 'authorised officers'⁴⁵ with 'suitable qualifications or experience'⁴⁶ to invoke the powers of arrest and search in order to perform their duties in relation to the investigation of corruption issues.⁴⁷ The powers are the same as those given to 'constables' – persons defined under the *Crimes Act 1914* to be special

42 The Hon. Justice James Wood, 8th *International Anti-Corruption Conference – The Papers*, 'Royal Commission into the New South Wales Police Service', paragraph 4.4, http://www.transparency.org/iacc/8th_iacc/papers/jwood.html (accessed 28 April 2005).

43 See also the comments of the Police Integrity Commission, *Submission 2*, p. 3; *Committee Hansard*, 27 April 2006, p. 11; Police Federation of Australia, *Submission 7*.

44 *Committee Hansard*, 27 April 2006, p. 13.

45 Law Enforcement Integrity Commissioner Bill 2006, clause 140.

46 Law Enforcement Integrity Commissioner Bill 2006, subparagraph 140(2)(a)(i).

47 Law Enforcement Integrity Commissioner Bill 2006, clause 139; *Explanatory Memorandum*, p. 75.

members of the AFP or members of the police force or police service of a State or Territory.⁴⁸

3.63 The Explanatory Memorandum indicates that these powers are proposed because, for obvious reasons, the Commissioner will often not be able to use serving police officers to perform duties in relation to corruption investigations involving other police. As noted by the NSW Wood Royal Commission, there are always dangers associated with allowing police to investigate other police, particularly where the prevailing culture militates against it.⁴⁹

3.64 The granting of such powers of arrest caused concern to the Police Federation of Australia, which argued that the power should be exclusive to sworn police constables.⁵⁰ In response, a representative from the Attorney-General's Department noted the importance of ensuring that the Integrity Commissioner is assisted by people who are demonstrably independent of any police force. However, it was stressed that such people would be:⁵¹

for example, ex-police or possibly police drawn from a foreign police force. Very occasionally ... they might be someone who had a slightly different background but clearly had the requisite skills to perform police type duties.⁵²

3.65 The committee appreciates the reservations expressed by the Police Federation of Australia concerning non-serving police officers accessing these powers, but it considers that ACLEI 'authorised officers' require such powers to effectively assist the Integrity Commissioner investigate police corruption issues.

3.66 The committee also accepts that the conditions set out in clause 140 for the appointment of authorised officers and the assurances given by the Attorney-General's Department in evidence are sufficient to ensure that only those who are suitably qualified will be appointed.

Power not to investigate

3.67 A second matter is that while clause 26 provides that the Integrity Commissioner 'may' investigate or refer a matter, it is silent on whether the Commissioner may determine that the matter does not require investigation or

48 *Crimes Act 1914*, Part IAA, Divisions 4 and 5.

49 Commissioner the Hon. Justice J.R.T. Wood, *Final Report of the Royal Commission into the New South Wales Police Service*, May 1997, p. 161.

50 Police Federation of Australia, *Submission 7*, p. 8.

51 Mr Michael Manning, Principal Legal Officer, National Law Enforcement Police Branch, Criminal Justice Division, Attorney-General's Department, *Committee Hansard*, 27 April 2006, p. 39; Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 75.

52 Mr Michael Manning, *Committee Hansard*, 27 April 2006, p. 39.

referral.⁵³ This may have the unfortunate practical result of limiting ACLEI's capacity to optimally manage its caseload and prioritise its resources.

3.68 In evidence to the committee, Dr Brown elaborated on this and explained the importance of establishing ACLEI as a body able to 'devote its resources strategically to the important cases by having a clear discretion not to investigate a range of matters based on particular criteria'.⁵⁴ Dr Brown suggested that this could easily be rectified by including provisions similar to those in the *Ombudsman Act 1976*.⁵⁵

3.69 Section 6 of the *Ombudsman Act 1976* gives the Commonwealth Ombudsman a discretion not to investigate if the Ombudsman is satisfied that the complainant was aware of the action more than twelve months before notifying the Ombudsman. Further he or she may decide not to investigate if Ombudsman considers:

- the complaint is frivolous or vexatious or was not made in good faith; or
- the complainant does not have a sufficient interest in the subject matter of the complaint; or
- an investigation, or further investigation, of the action is not warranted having regard to all the circumstances.

3.70 The committee agrees with these views, and acknowledges that there will be occasions when ACLEI would be wasting resources pursuing a complaint. A certain number of malicious, unfounded or groundless complaints are to be expected, and the inclusion of an explicit discretion not to investigate would support the efficiency of ACLEI.

Recommendation 2

3.71 The committee recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended to provide the Integrity Commissioner with discretion not to investigate or refer a complaint where he or she considers the complaint to be frivolous:

- **the complaint is frivolous or vexatious or was not made in good faith; or**
- **the complainant does not have a sufficient interest in the subject matter of the complaint; or**
- **an investigation, or further investigation, of the action is not warranted having regard to all the circumstances.**

53 Dr A.J. Brown, *Submission 8*, p. 6.

54 *Committee Hansard*, 27 April 2006, p. 8.

55 *Committee Hansard*, 27 April 2006, p. 8.

Whistleblower protection

3.72 Paragraph 22(2)(c) of the LEIC Bill could create the opposite problem. This provision relieves agencies from referring corruption matters if they believe that they are not made in good faith.

3.73 This provision may inadvertently serve to discourage whistleblowers. In his submission, Dr Brown observed that the use of such terms as 'in good faith' at the State level has proved 'highly problematic':

This term can only function to confuse agencies and informants as to reporting requirements, and act as a disincentive to report corruption by internal witnesses (whistleblowers) who have, or may appear to have, mixed motives for making the report. Many whistleblowers fall into this category, providing true and significant information about the misconduct of others even though they may be doing so out of motives of revenge, self-enhancement or a desire to embarrass or damage the organisation.⁵⁶

3.74 This factor could work to neutralise other provisions in the Bill that serve to protect whistleblowers. Clause 220 of the LEIC Bill makes it an offence to cause, or threaten detriment to another person on the ground that a person has referred, or may refer to the Integrity Commissioner or the Minister an allegation or information that raises a corruption issue. The clause also covers those who have produced documents or things to ACLEI. The offence attracts a maximum penalty of two years gaol.

3.75 Clause 81 provides that 'a person who gives information, or produces a document or thing to the Integrity Commissioner in response to a request under section 75 or 76 has the same protection as a witness in proceedings in the High Court'. The Explanatory Memorandum indicates, by way of example, that this could mean a witness will receive protection against 'threatening behaviour, intimidation, injury and violence'.⁵⁷ These are based on offences contained in Part III of the *Crimes Act 1914*.

3.76 It is essential that the informants to ACLEI must be adequately protected. Such informants may face considerable personal risk in revealing information about corrupt conduct and failure to ensure the person giving information is protected from retribution, becomes a disincentive to such people and thereby defeats the purpose of the LEIC Bill.

3.77 For this reason, the committee agrees with Dr Brown's suggestion that the words 'in good faith' be removed from the Bill.

56 Dr A.J. Brown, *Submission 8*, p. 7.

57 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 41.

3.78 The committee also considers that the existing protections for whistleblowers could be further enhanced by the inclusion of a provision such as that contained in section 51 of the *Police Integrity Act 1996 (NSW)*, which provides:

51 Protection of witnesses and persons assisting Commission

(1) Arrangements for protection:

If it appears to the Commissioner that, because a person is assisting the Commission, the safety of the person or any other person may be prejudiced or the person or any other person may be subject to intimidation or harassment, the Commissioner may make such arrangements as are necessary:

- (a) to protect the safety of any such person, or
- (b) to protect any such person from intimidation or harassment.

Recommendation 3

3.79 The committee recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended to remove the phrase 'in good faith' from proposed paragraph 22(2)(c).

Recommendation 4

3.80 The committee further recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended to insert a provision to improve protection for informants, such that where it appears to the Integrity Commissioner that a person's safety may be prejudiced or that person may be subject to intimidation or harassment, he or she may make such arrangements as are necessary to protect the safety of any such person, or to protect any such person from intimidation or harassment.

3.81 It has also been noted that the LEIC Bill contains no sanction against giving false or misleading information. Inclusion of such a sanction would deter dishonest informants from abusing the process, without the potentially counterproductive results of the 'in good faith' provisions discussed above.⁵⁸

3.82 The committee accepts this argument and considers that the creation of an offence of giving false and misleading information would provide an additional deterrent to those contemplating giving such information.

Recommendation 5

3.83 The committee recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended to provide an offence of giving false or misleading information to ACLEI, with an appropriate maximum penalty.

58 Dr A.J. Brown, *Submission 8*, p. 7.

Hearings procedures

3.84 Under Division 2 of the LEIC Bill, the Integrity Commissioner may hold hearings in private or in public. Certain evidence must be given in private. Clause 89 also includes provision for a party to apply to have the evidence given in private.

3.85 The procedure for conducting such proceedings is not specified, and the committee notes that this uncertainty was a cause of complaint to the PJC on the ACC during their inquiry into the operation of the similar provisions under the ACC Act. In the interests of procedural fairness to persons called before Commission, it is desirable that the nature of proceedings, the rules of procedure to be adopted, and the rights of witnesses and their counsel, be clearly set out.

Recommendation 6

3.86 The committee recommends that a practice and procedure manual be developed by ACLEI as soon as possible after it commences operation.

External agencies and communication

3.87 As is evident from the preceding discussion, the proposed commission will operate in a complex matrix of both law enforcement agencies and other integrity agencies, at both Commonwealth and state or territory level.

3.88 For the wider integrity system to function effectively, it is important that these relationships are productive and the rights and responsibilities of each element clearly determined. Several issues warrant comment in this respect.

Australian Federal Police and Australian Crime Commission

3.89 It is expected that ACLEI's relationship with the AFP and ACC will be a positive one. Mr Alastair Milroy, Chief Executive Officer of the ACC stated that ACLEI would provide the impetus for review and change of some existing ACC processes and programs, particularly those aimed at prevention.⁵⁹ Commissioner Keelty stated he did not envisage a large change to the AFP's existing integrity framework as a result of ACLEI, except for the fact that an external body would refer matters that might otherwise not have come to the AFP's attention.⁶⁰

3.90 As mentioned by Commissioner Keelty, when addressing corruption issues, ACLEI may refer a corruption issue to the AFP or ACC for investigation, and may manage or oversee an investigation being conducted by them (clause 26). In making this decision, ACLEI must consider the rights and obligations of the AFP and the ACC to investigate the issue themselves. This, in addition to the other range of factors listed in the LEIC Bill ensures that, within available resources, ACLEI effectively

59 *Committee Hansard*, 27 April 2006, p. 27.

60 *Committee Hansard*, 27 April 2006, p. 27.

investigates serious and systemic corruption and, so far as possible, refers other matters to an agency in a position to investigate them effectively.⁶¹

State bodies

3.91 A number of issues were raised by the PIC in relation to the functions of ACLEI and its interaction with State bodies. Of particular concern, were the notification and consultation mechanisms available to the PIC and ACLEI in relation to ACLEI investigations involving NSW police officers.⁶²

3.92 The PIC argued the notification provisions in the LEIC Bill were too narrow as they only require ACLEI to notify a State agency when an allegation of corruption is raised in relation to a State officer seconded to a Commonwealth law enforcement agency.⁶³ On the basis of consistency of treatment, the PIC argued that the Bill should be extended to include occasions where a non-seconded State officer is involved in corruption with staff members of a Commonwealth law enforcement agency and even where no Commonwealth officer is involved at all.⁶⁴ Mr Kearney from the PIC maintained that such an obligation would overcome the potential for insufficient information sharing that could lead to: different treatment for seconded and non-seconded officers; missed opportunities for investigation; or parallel investigations by ACLEI and the relevant State agency.⁶⁵

3.93 The PIC was also concerned that any ACLEI investigation report, or information or intelligence received involving a State officer, should be communicated to an interested State agency.⁶⁶ As currently drafted, the LEIC Bill limits ACLEI's ability to disseminate information to a person or authority able to prosecute or commence civil penalty proceedings.⁶⁷ The PIC argued that the Bill should allow ACLEI to communicate 'less probative' information – for example, intelligence on inappropriate relationships involving a police officer and a criminal – as it could lead to 'quite significant investigations'.⁶⁸ Mr Kearney suggested the insertion of a 'catch-all' provision similar to subsection 18(3) of the *Police Integrity*

61 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 5.

62 Police Integrity Commission, *Submission 2*, pp 1-3.

63 Law Enforcement Integrity Commissioner Bill 2006, clauses 29-30; Police Integrity Commission, *Submission 2*, p. 1; *Committee Hansard*, 27 April 2006, p. 10.

64 Police Integrity Commission, *Submission 2*, p. 1; Mr Allan Kearney, *Committee Hansard*, 27 April 2006, p. 10.

65 *Committee Hansard*, 27 April 2006, p. 10.

66 Police Integrity Commission, *Submission 2*, p. 2; *Committee Hansard*, 27 April 2006, p. 11 and 13.

67 Law Enforcement Integrity Commissioner Bill 2006, clauses 142 and 148.

68 *Committee Hansard*, 27 April 2006, p. 11.

Commission Act 1996 Act to enable dissemination of information where considered appropriate by ACLEI.⁶⁹

3.94 The proposed obligation of Commonwealth law enforcement agencies to notify ACLEI of relevant matters – regardless of the source of the intelligence – was another area of concern.⁷⁰ The PIC argued that information disclosed to a Commonwealth law enforcement agency (for example, during a joint investigation) might be passed on without regard to the appropriateness of that disclosure. The PIC's primary concern was that an ongoing investigation may be prejudiced as a consequence of the disclosure by the Commonwealth agency to ACLEI.⁷¹

3.95 Mr Kearney also argued that ACLEI's power to require information or documents from the PIC and similar State agencies should be limited.

The bill, as it is presently worded, appears to require the commission [PIC] to release potentially the most critical information—and this information may well have been obtained under our own compulsive powers—regardless of our secrecy provision and the potential for impact on current investigations.⁷²

3.96 The PIC would prefer to see this area subject to more 'cooperative arrangements'.⁷³

3.97 In response to the PIC's comments, a representative from the Attorney-General's Department stated that ACLEI:

... would tend to always have regard for the view of the other integrity agencies in these sorts of arrangements. There is obviously a need to make sure that in any investigation ACLEI does not interfere with ongoing investigations and does not corrupt the work of other agencies. I think there needs to be a very close working relationship between the likes of ACLEI and state bodies.⁷⁴

3.98 The Attorney-General's Department acknowledged that the relationships ACLEI builds with others will ultimately depend on the way in which the Integrity Commissioner operates in practice. The Department stated that ACLEI has the flexibility under the LEIC Bill to adopt whatever approach to investigation 'seems

69 Police Integrity Commission, *Submission 2*, p. 2; *Committee Hansard*, 27 April 2006, p. 11.

70 Law Enforcement Integrity Commissioner Bill 2006, clause 19; Police Integrity Commission, *Submission 2*, pp 2-3; *Committee Hansard*, 27 April 2006, p. 11.

71 *Committee Hansard*, 27 April 2006, p. 11.

72 *Committee Hansard*, 27 April 2006, p. 11.

73 Police Integrity Commission, *Submission 2*, p. 3.

74 Mr Craig Harris, Assistant Secretary, National Law Enforcement Policy Branch, Criminal Justice Division, Attorney-General's Department, *Committee Hansard*, 27 April 2006, p. 31.

sensible in the circumstances of each case'.⁷⁵ The conduct of two parallel investigations, for example, would not normally be an appropriate way to proceed.

3.99 The Department noted that it was considering the comments of the Police Integrity Commission in relation to the need to ensure that the LEIC Bill allows sufficient exchange of information to avoid unintentional duplication of investigations.⁷⁶

Commonwealth Ombudsman

3.100 The Commonwealth Ombudsman also raised two issues pertaining to information sharing between it and ACLEI. The first related to the proposed amendment to section 6 of the *Ombudsman Act 1976* by the Consequential Amendments Bill to enable the Commonwealth Ombudsman to transfer matters to ACLEI.⁷⁷ Whether the Ombudsman may or must do so depended on the Ombudsman being satisfied that the matter raises a 'corruption issue' or 'a significant corruption issue'. Dr Vivienne Thom, Deputy Ombudsman, Commonwealth Ombudsman, argued that the Consequential Amendments Bill should be amended to ensure that corruption issues that become apparent through not only complaint investigations, but also own motion investigations by the Ombudsman, may be referred to ACLEI.⁷⁸

3.101 The second issue concerned the need for greater clarity in relation to ACLEI's obligations to notify the Commonwealth Ombudsman of information relating to a matter referred by the Ombudsman.⁷⁹ Dr Thom argued that the Bill, as currently drafted, would require the Ombudsman to mount an investigation to seek the information.⁸⁰

3.102 In relation to this second concern, the Attorney-General's Department noted that the Consequential Amendments Bill was not intended to leave the Ombudsman in a position where it could not receive information without initiating an investigation of its own. As such, this matter would be considered for possible amendments.⁸¹

75 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 4.

76 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 4.

77 Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006, item 42; *Submission 4*, p. 5.

78 Commonwealth Ombudsman, *Submission 4*, p. 5; *Committee Hansard*, 27 April 2006, p. 25.

79 Commonwealth Ombudsman, *Submission 4*, pp 5-6.

80 Dr Vivienne Thom, Deputy Ombudsman, Commonwealth Ombudsman, *Committee Hansard*, 27 April 2006, p. 25.

81 Mr Michael Manning, *Committee Hansard*, 27 April 2006, p. 32.

Committee view

3.103 The establishment of a body at the Commonwealth level adds another layer to the existing integrity framework in Australia. This will require consideration of how these integrity agencies will interact and coordinate their activities to ensure the coherent operation of the system.

3.104 The committee believes that the relationships ACLEI has with other Commonwealth, State and Territory bodies are of great importance and that the proposed legislation should not curtail the dissemination of information to or from ACLEI. While the LEIC Bill plays an important part in shaping and governing ACLEI's relationships, the committee notes that ACLEI and other relevant bodies will need to deal with each other professionally and cooperatively to ensure the smooth flow of relevant information.

3.105 The committee is also aware that the confidentiality of information obtained from other agencies should be maintained so as not to jeopardise other operations. The committee considers that suitable frameworks should be established to maintain that confidentiality while adhering to the processes established under the LEIC Bill.

Recommendation 7

3.106 The committee recommends that amendments are made to the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 to ensure that a corruption issue that becomes apparent through an own motion investigation undertaken by the Commonwealth Ombudsman can be referred to ACLEI.

Recommendation 8

3.107 The committee recommends that the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 be amended to provide greater clarity in relation to ACLEI's obligations to notify the Commonwealth Ombudsman of information relating to a matter referred by the Ombudsman.

Accountability and reporting

3.108 The LEIC Bill provides several accountability mechanisms for the Commission itself, including reporting to government and to Parliament.

3.109 The LEIC Bill provides that ACLEI must report to the government, and the Parliament through the Minister: clauses 54-59 (reporting an investigation); 73-74 (reporting on a public inquiry to the Minister); 169-173 (reports of special investigation to Minister); and 201-206 (public reporting: annual reports).

3.110 Under clause 203 a report is to be provided to Parliament on all public inquiries and all investigations that involved public hearings. In other words, subject

to the excision of sensitive material, outcomes of all public hearings will be forwarded to Parliament.⁸² If an investigation has been conducted without public hearings, there is no obligation on the Minister to table a report in Parliament, but the Minister may do so. According to the Attorney-General's Department, the LEIC Bill provides for investigations to be conducted either in public or in private in accordance with judgements as to the balance of public interest, and makes consequential provision about publication of reports.⁸³

3.111 ACLEI must provide an annual report to the Minister to be laid before Parliament (clause 213). It is proposed that ACLEI's activities will also be overseen by a Parliamentary Joint Committee (PJC) (Part 14) and that the Commonwealth Ombudsman will report on controlled operations.

3.112 Part 12 of the LEIC Bill provides for the Minister to authorise a special external investigation into allegations of corruption within the Commission itself. There are several options available for the Minister, including allowing the Integrity Commissioner to investigate the matter.

3.113 Several issues arise in relation to the oversight processes:

- The independence of the Commission from government.
- The jurisdiction of the proposed Parliamentary Joint Committee.
- Legislative review.

An independent relationship with government

3.114 Dr Brown was concerned that the reporting regime was narrow, and that it limited ACLEI's independence to reporting only via the government and Parliament. He noted that even in cases where the Minister must table the report within 15 sitting days of receipt, in a period of parliamentary recess, the report's release may occur long after the relevant time has passed.⁸⁴

3.115 His solution to this was to allow ACLEI to publish its views:

on any matter at any time where it considers it to be in the public interest to do so, provided it satisfies normal requirements of natural justice and not releasing sensitive or dangerous information. This power would also enable the release of interim reports or other statements that facilitate the work of the Commission, without any concern as to whether the Commission has power to do so.⁸⁵

82 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 7.

83 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 7.

84 Dr A.J. Brown, *Submission 8*, p. 7.

85 Dr A.J. Brown, *Submission 8*, p. 7.

3.116 Dr Brown noted that section 35A of the *Ombudsman Act 1976* is an example of a provision which has been effective. This section allows the Commonwealth Ombudsman to disclose information or make a statement about investigations if he or she considers it is in the interest of any Department, prescribed authority or person, or is in the public interest. There are limitations on this, but the section does allow the Commonwealth Ombudsman to speak independently about the results of his or her inquiries, without having to go through the Minister or the Parliament first.

3.117 The key issue is whether or not ACLEI's accountability to the Parliament would be compromised by the ability of the Integrity Commissioner to report or comment without going through the Minister and the Parliament. The committee notes that the Police Integrity Commissioner in NSW is not able to comment publicly on matters which have not been first reported to the Minister and the Parliament.

3.118 It could also be argued that the Office of the Commonwealth Ombudsman is an entirely different construct from the integrity body such as the one contemplated – part of the Ombudsman's credibility lies in its responsibilities regarding reporting.

3.119 At this time the committee does not accept this suggestion.

3.120 Related to the issue of reporting is the release of information by the Minister under Part 11 of the LEIC Bill. Under this part, the Attorney-General may determine whether particular information will be released by the Integrity Commissioner, and may also certify that the disclosure of particular information would be contrary to the public interest. In determining this, the Minister may issue the certificate because the information would:

prejudice the security, defence or international relations of the Commonwealth, prejudice the proper performance of the ACC, an investigation, inquiry, fair trial, a person's life or physical safety or disclose the identity of a confidential source.⁸⁶

3.121 Other provisions prohibit the communication of information certified under clause 149 between agencies, and to the Integrity Commissioner.

3.122 The Police Federation of Australia proposed a reporting process to apply when the Minister issues a certificate under clause 149, in order to ensure openness and accountability.⁸⁷

3.123 The Attorney-General's Department stated that the basis on which the Attorney-General could certify information under clause 149 was substantially similar to the scheme established under section 70 of the *Privacy Act 1988*; although it was

86 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 79.

87 Police Federation of Australia, *Submission 7*, p. 8.

wider than the list of matters for which such a certificate could be issued under subsection 9(3) of the *Ombudsman Act 1976*.⁸⁸

3.124 When questioned about the proposition that the Attorney-General provide more detailed reasons for the issue of a certificate, the Department stated:

[this] would tend to nullify the utility of the scheme by requiring disclosure of matters which might reveal some of the information the certificate was intended to keep out of the public domain.⁸⁹

Committee view

3.125 The committee agrees that this proposal is one which could enhance the accountability regime of ACLEI, and considers that should be a matter on which the Minister reports annually to Parliament.

3.126 While the committee accepts providing detailed reasons for the issuing of each clause 149 certificate may be impractical, it remains important for the transparency of the overall system that certain information is available to the Parliament on the operation of the proposed section. It should be possible, without prejudicing security, to publish a report that includes, for example, the number of times clause 149 certificates have been issued by the Minister; the number of documents exempted by the certificate, and from which agency the information derives. Such generalised information would give an indication of the extent to which the power is being used and the amounts of information being excluded from the Commissioner's inquiries.

Recommendation 9

3.127 The committee recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended to require the Minister to provide a report to Parliament on the proposed section 149 certificates he or she has provided in the previous financial year.

Parliamentary Joint Committee

3.128 The duties and powers for the proposed Parliamentary Joint Committee set out in Part 14 of the Bill, appear closely similar to those of the existing Parliamentary Joint Committee on the Australian Crime Commission (the PJC on the ACC) and expressly preclude the committee from investigating an ACLEI corruption issue, reconsidering the Integrity Commissioner's decisions or making recommendations in relation to a particular corruption issue.

3.129 The committee notes that the *Review of the Australian Crime Commission Act 2002* conducted by the PJC on the ACC identified the importance of parliamentary

88 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 9.

89 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 9.

scrutiny and accountability, and in particular, differentiating between parliamentary and executive accountability.⁹⁰

3.130 The desirability of having such parliamentary oversight is accepted and endorsed. However, it is legitimate to consider whether it is necessary to create a second PJC that is so similar to the existing committee tasked with scrutinising the ACC. In the context, the committee notes that the PJC on the ACC considered this issue in detail in its review, and recommended an expansion of its jurisdiction to cover all Commonwealth Law Enforcement agencies including the ACLEI.⁹¹

3.131 The representative from the Attorney General's Department did not consider this to be a practical option. The Department argued that it was appropriate to establish a new PJC to oversee ACLEI to ensure consistency with the previous practice to establish a specialised committee to oversee the use of special coercive powers.⁹² It was not considered appropriate to give this task to the existing PJC on the ACC because 'while it will have similar powers, ACLEI has a different function from the ACC'.⁹³

3.132 The Department acknowledged that a 'degree of duplication' with the roles of existing committees with law enforcement interests (including the Senate Legal and Constitutional Committee itself) was unavoidable, but that this ought not to be the primary consideration for the decision.⁹⁴

3.133 The Department pointed out that:

ACLEI has a different function from the ACC and will deal with agencies that are not subject to oversight by the PJC-ACC. At the outset the ACC will account for just over 10% of the total number of people within the Integrity Commissioner's jurisdiction.⁹⁵

3.134 The Department further argues that a broader jurisdiction would tend to distract the PJC on the ACC from its focus on the operation of the ACC and the challenges posed by organised crime.

3.135 In reality however, a focus on the 'challenges of organised crime' precludes a sole focus on the ACC. All issues of organised crime are investigated jointly by combinations of Commonwealth law enforcement agencies, and thus, in each inquiry

90 PJC on the ACC, *Review of the Australian Crime Commission Act 2002*, pp 74 & 78.

91 PJC on the ACC, *Review of the Australian Crime Commission Act 2002*, p. 86 (Recommendation 12).

92 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 8.

93 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 8; Mr Craig Harris, *Committee Hansard*, 27 April 2006, p. 35.

94 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 8.

95 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 8.

conducted by the PJC on the ACC, it was necessary to consult with not only the ACC but the AFP, Customs and others.

3.136 To suggest that it is 'inappropriate' for a committee to have oversight of both the ACLEI and the ACC implies some conflict in the two roles – an argument that is unsubstantiated and suggests a misunderstanding of the role of parliamentary scrutiny in an overall accountability framework.

3.137 Consideration of this issue requires an understanding of the particular strengths and weaknesses of parliamentary scrutiny. As the Review of the ACC Act identified, the PJC is most effective in four key areas.

- First, providing scrutiny of financial expenditure (through the examination of the Annual Reports).
- Second, enable the development of parliamentary expertise on law enforcement powers and activities, crucial to effective legislative activity.
- Third, providing a forum for public debate in an otherwise (necessarily) rather secretive and opaque area of government operations.
- Finally, by a combination of all these, the parliamentary committee is best placed to take an overall systems-view of the accountability framework, and the powers and jurisdictions of the various agencies that comprise that framework. Importantly, this operates outside of the operational focus of executive government and its agencies.⁹⁶

3.138 However, neither the PJC on the ACC nor the proposed PJC on the ACLEI are able to investigate particular matters – both by reason of legislative limits, and because they lack the skills and resources to conduct investigations. It is for these reasons that the PJC on the ACC supported the need for an investigative agency such as the ACLEI.

3.139 As noted above, in recognition of its dual focus on both law enforcement and integrity issues the PJC on the ACC recommended the broadening its jurisdiction to include the ACC, the ACLEI, and the AFP. This approach was considered to be the best way to maximise the effectiveness of the strengths of parliamentary oversight in assessing the integrity of the overall system, and the expertise of the parliamentarians who are members of the committee.

3.140 Conversely, creating separate committees duplicates accountability mechanisms, requires extra parliamentary resources and fails to capitalise on the synergies of knowledge across these similar areas.

3.141 The committee agrees with this analysis and endorses the recommendation to create a single PJC for Commonwealth Law Enforcement with jurisdiction over both the ACLEI and the law enforcement agencies that are subject to ACLEI's oversight.

96 PJC on the ACC, *Review of the Australian Crime Commission Act 2002*, pp 74-78.

Recommendation 10

3.142 The committee recommends that Part 14 of the Law Enforcement Integrity Commissioner Bill 2006 be amended to provide the existing Parliamentary Joint Committee on the Australian Crime Commission with jurisdiction to scrutinise the Australian Commission for Law Enforcement Integrity and those Commonwealth law enforcement agencies subject to its oversight.

Review provisions

3.143 The committee notes that the LEIC Bill makes no provision for a review of the legislation. The establishment of the proposed Commission is a significant development in the Commonwealth's overall integrity framework and, as this report has suggested, there are several significant aspects of the Commission's jurisdiction, powers, proceedings and relationships that need to be resolved over the first couple of years of operation. As such, the committee considers it important that a review of legislation be carried out after the first few years of operation of the Act.

3.144 In this respect, the committee notes that a requirement for an independent review of the legislation was contained in the *Australian Crime Commission Act 2002*.⁹⁷ Where this review is performed by the parliamentary committee charged with the supervision of the Commission, a dual purpose is served by both conducting the review and providing the committee with a forum for developing its own expertise in the provisions and operation of the Act.

Recommendation 11

3.145 The committee recommends that the Law Enforcement Integrity Commissioner Bill 2006 be amended to provide for a review three years from the date of commencement of the Act.

Definition of 'corruption issue'

3.146 The expression 'corruption issue' is defined in clause 7 of the LEIC Bill. A corruption issue exists where a staff member of a 'law enforcement agency':

- (a) has, or may have, engaged in corrupt conduct; or
- (b) is, or, may be, engaging in corrupt conduct; or
- (c) will, or may at any time in the future, engage in corrupt conduct.

3.147 As discussed earlier, a 'law enforcement agency' is defined as the AFP, ACC, former NCA, or any other Commonwealth government agency that has a law enforcement function and is prescribed by regulation.⁹⁸

97 Section 61A

98 Law Enforcement Integrity Commissioner Bill 2006, clause 5.

3.148 'Engaged in corrupt conduct' is defined broadly in clause 6 as abuse of office as a staff member of the agency; conduct that perverts the course of justice; or conduct that involves, or is engaged in for the purpose of, corruption of any other kind.

3.149 Dr Brown claimed that the definition of a 'corruption issue' 'focuses squarely on the fact that official corruption can really take the form of any kind of abuse of official office or public trust'.⁹⁹

3.150 Given that ACLEI's focus is the detection, prevention and investigation of corruption, Dr Brown strongly supported this broad definition of corruption used in the LEIC Bill.¹⁰⁰ In evidence, he stated:

There has been an unfortunate trend around Australia in many jurisdictions for definitions of corrupt conduct or improper conduct to become more technical, more convoluted, more narrow and more difficult to administer and to then be used to hamper the jurisdiction of the bodies involved...¹⁰¹

3.151 Mr James Torr, Chief Executive Officer, Australian Federal Police Association and Delegate, National Council, Police Federation of Australia, argued that the Bill should contain examples to provide practical guidance to people as to what would constitute corruption. Mr Torr did however accept that this approach could be problematic because what constitutes 'corruption' will depend on the factual context presented at any given time.¹⁰²

3.152 An alternate definition of corruption – the one used by the ICAC in NSW – was put forward as a preferable approach by the Police Federation of Australia as it contains a more exhaustive standard.¹⁰³ 'Corruption' is defined at sections 7 and 8 of the *Independent Commission Against Corruption Act 1988 (NSW)*. Generally speaking, the Act defines corrupt conduct as a variety of conducts relating to the adverse or dishonest use of a person's official functions or misusing information that they have gained in the course of their official functions.¹⁰⁴

3.153 In acknowledging the two definitional approaches, a representative from the Attorney-General's Department explained that there is a policy of following the existing definitions of corruption used in Commonwealth legislation so as to ensure 'uniformity'.¹⁰⁵ Thus, substantially the same definition of corruption should be used as

99 *Committee Hansard*, 27 April 2006, p. 2.

100 *Committee Hansard*, 27 April 2006, p. 2.

101 *Committee Hansard*, 27 April 2006, p. 2.

102 *Committee Hansard*, 27 April 2006, pp 21-22.

103 Police Federation of Australia, *Submission 7*, pp 4-5.

104 Independent Commission Against Corruption, *What we mean by corruption*, <http://www.icac.nsw.gov.au/index.cfm?objectid=A383B4F3-B104-B35D-308815C3036D78BE> (accessed 1 May 2006); Senator J. Ludwig, *Committee Hansard*, 27 April 2006, p. 12.

105 Mr Michael Manning, *Committee Hansard*, 27 April 2006, p. 33.

in legislation dealing with forfeiture of superannuation benefits by people convicted of corruption offences, namely the *Crimes (Superannuation Benefits) Act 1989* and Part VA of the AFP Act.¹⁰⁶

As 'downstream' consequences of a conclusion by the Integrity Commissioner that a person had engaged in corrupt conduct would potentially include conviction for a 'corruption offence' and forfeiture of superannuation benefits, it was considered important that the definitions at both stages should be consistent.¹⁰⁷

3.154 The Department did not see any clear advantage in adopting the 'complex definition' used in the *Independent Commission Against Corruption Act 1988 (NSW)*.¹⁰⁸

3.155 In commenting on the scope of the definition of 'corruption issue', the Attorney-General's Department stated:

I do not think ultimately it would be either more or less rigorous [than the ICAC definition]. It just goes into less fine detail.¹⁰⁹

Committee view

3.156 The community expects the AFP and the ACC to perform their duties with honesty and in the best interests of the public and the Commonwealth. Corrupt conduct involves a breach of public trust and leads to inequality, wasted resources and wasted public money.

3.157 The committee supports the use of a broad definition of 'corruption' as proposed by the Bill. Though some have argued that the definition is too broad, the use of a narrower definition may limit the conduct, activities and issues that trigger the application of the proposed legislation (though the committee notes that no evidence presented to the inquiry suggests that state legislative standards – such as the ICAC definition – have constrained the activities of state bodies in any way). The committee believes that ACLEI should not be limited by definitional issues in the exercise of its power and resources.

106 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 1; Mr Michael Manning, *Committee Hansard*, 27 April 2006, p. 33.

107 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 1.

108 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 1.

109 *Committee Hansard*, 27 April 2006, p. 33.