

The Senate

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Legal and Constitutional  
Legislation Committee

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Provisions of:

Law Enforcement Integrity Commissioner Bill 2006

Law Enforcement Integrity Commissioner  
(Consequential Amendments) Bill 2006

Law Enforcement (AFP Professional Standards  
and Related Measures) Bill 2006

May 2006

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# ABBREVIATIONS

ACC	Australian Crime Commission
ACC Act	<i>Australian Crime Commission Act 2002</i>
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
AFP Act	<i>Australian Federal Police Act 1979</i>
AFP Professional Standards Bill	Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006
AIRC	Australian Industrial Relations Commission
ALP	Australian Labor Party
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ATO	Australian Taxation Office
CCC	Corruption and Crime Commission
CDPP	Commonwealth Director of Public Prosecutions
CMC	Crime and Misconduct Commission
Complaints Act	<i>Complaints (Australian Federal Police) Act 1981</i>
Consequential Amendments Bill	Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006
Customs	Australian Customs Service
Department	Attorney-General's Department
DIMA	Department of Immigration and Multicultural Affairs
ICAC	Independent Commission Against Corruption
LEIC Bill	Law Enforcement Integrity Commissioner Bill 2006
NCA	National Crime Authority

NSW

New South Wales

PIC

Police Integrity Commission

PJC

Parliamentary Joint Committee

WRA

*Workplace Relations Act 1996*



# RECOMMENDATIONS

## 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.

## 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.

## 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.

## 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.

## 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.

### **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.

### **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.

### **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.

### **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.

### **Recommendation 12**

**4.** The committee recommends that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 be amended to provide that a determination on categories of conduct shall be made by the Commonwealth Ombudsman and the Commissioner of the Australian Federal Police within three months of the commencement of the Act.

### **Recommendation 13**

**4.65** The committee recommends that the lower level disciplinary matters (categories 1 and 2) should be subject to internal review while more serious matters (category 3) should be the subject of external review for example, through the Administrative Appeals Tribunal.

#### **Recommendation 14**

**4.66** The committee also recommends that the possible conflict of the Bill with the *Workplace Relations Act 1996* be resolved, before the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 is enacted.

#### **Recommendation 15**

**4.74** The committee recommends that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 clarify that the professional standards regime applies to the Commissioner of the Australian Federal Police.



# CHAPTER 1

## INTRODUCTION

### Background

1.1 On 30 March 2006, the Senate referred the Law Enforcement Integrity Commissioner Bill 2006, the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 and the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 11 May 2006.

1.2 The Law Enforcement Integrity Commissioner Bill 2006 establishes the Australian Commission for Law Enforcement Integrity (ACLEI). The Integrity Commissioner will head up the organisation and will be responsible for detecting and investigating allegations of corruption against the Australian Federal Police (AFP) and the Australian Crime Commission (ACC) and will have the powers of a Royal Commission.

1.3 The Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 amends a range of Acts consequential to the establishment of ACLEI, including provisions for access to the full range of police special investigative powers.

1.4 The Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 repeals the *Complaints (Australian Federal Police) Act 1981* and inserts a new part into the *Australian Federal Police Act 1979* to update the complaints and professional standards regime within the AFP.

### Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper on 4 April and 12 April 2006. Submissions were invited by 21 April 2006. Details of the inquiry, the Bills and associated documents were placed on the committee's website. The committee also wrote to interested organisations and individuals.

1.6 The committee received 11 submissions and two supplementary submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public. The committee held a public hearing in Sydney on 27 April 2006.

### Acknowledgement

1.7 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

**Note on references**

1.8 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

# CHAPTER 2

## OVERVIEW OF THE BILL

### Background

#### *Law Enforcement Integrity Commissioner Bill 2006 and Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006*

2.2 The Law Enforcement Integrity Commissioner Bill 2006 (LEIC Bill) establishes the office of the Integrity Commissioner who will head up the Australian Commission for Law Enforcement Integrity (ACLEI), an independent body with powers to prevent, detect and investigate corruption within Commonwealth government law enforcement agencies, including the Australian Federal Police (AFP) and the Australian Crime Commission (ACC).<sup>1</sup> In his second reading speech, the Attorney-General, the Hon. Philip Ruddock MP, stated that other Commonwealth agencies may later be brought within ACLEI's jurisdiction by regulation.<sup>2</sup>

2.3 When he announced that the Commonwealth would establish an independent anti-corruption body, the Minister for Justice and Customs, Senator the Hon. Chris Ellison 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 a independent body with the powers of a Royal Commission to address corruption at the Federal level should it arise.<sup>3</sup>

2.4 The LEIC Bill and its companion Bills have had a lengthy development which reflects the experience of several Australian States in investigating serious corruption.

#### *State Bodies*

2.5 A number of Australian jurisdictions have established statutory bodies with power to investigate misconduct and corruption in the public sector generally.<sup>4</sup> In other words, the powers of these State bodies are wider than only investigating corruption or misconduct in law enforcement agencies. For the most part, these bodies are also empowered to investigate organised crime.

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1 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 1.

2 *House of Representatives Hansard*, 29 March 2006, p. 9.

3 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.

4 Sue Harris Rimmer, *Client Memorandum – Law Enforcement Integrity Commissioner Bills*, 21 April 2006, p. 3.

2.6 **New South Wales** – In 1988, NSW established the Independent Commission Against Corruption (ICAC). ICAC's functions include investigating allegations of corruption including those made against members of the NSW Police. In addition, the Police Integrity Commission (PIC) was established in 1996 upon the recommendation of the Wood Royal Commission. The PIC's functions include preventing, detecting or investigating police corruption and other serious police misconduct and to manage or oversee other agencies doing the same.<sup>5</sup> The ICAC retained an advisory and support role for the PIC.

2.7 **Queensland** – In 2002, the Criminal Justice Commission and the Queensland Crime Commission merged to form the Crime and Misconduct Commission (CMC). The CMC serves two basic functions. The first relates to the investigation of major and organised crime. The second relates to complaints of misconduct by public sector employees, including those from the police service. The CMC also has a research function and prevention function.

2.8 **Western Australia** – The Corruption and Crime Commission of Western Australia (CCC) investigates allegations of misconduct by Western Australian police officers and public officers. It also conducts education programs with State government departments, agencies, and in the community, to increase the awareness of misconduct and how to counter it. The CCC took over the cases from the Anti-Corruption Commission (that ceased to operate on 26 May 2004) and the Police Royal Commission.<sup>6</sup>

2.9 **Victoria** – Victoria has no analogous body to those noted above. However, in 2004, a Police Ombudsman was established which subsequently became the Office of Police Integrity in November 2004. The Director of Police Integrity is also the Victorian Ombudsman.

### *The Commonwealth*

2.10 Preventing and combating public sector corruption at the Commonwealth level is not a new issue. In 1976, the Commonwealth Ombudsman was established and, since that time, the office has been entrusted with the functions of overall integrity 'watchdog' through its role as office of final resort for complaints about defective administration.<sup>7</sup> As a separate function, the investigation of corrupt and

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5 G.A. Kennedy AO QC, *Royal Commission into whether there has been any corrupt or criminal conduct by Western Australian police officers – Interim Report*, December 2002, pp 57-58.

6 Corruption and Crime Commission of Western Australia, <http://www.ccc.wa.gov.au/> (accessed on 30 April 2006).

7 *Complaints (Australian Federal Police Act) 1981*; Dr A.J. Brown, 'Federal anti-corruption Policy takes a new turn...but which way? Issues and options for a Commonwealth integrity agency', *Public Law Review*, 2005, vol. 16, no. 89, p. 93.



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other behaviour involving Commonwealth officials, for the most part, rested with the AFP and later the National Crime Authority (NCA), now the ACC.<sup>8</sup>

2.11 In 1996, the Australian Law Reform Commission (ALRC) proposed a major departure from these arrangements and recommended that:

a new single agency...should be established to investigate or manage/supervise the investigation of complaints against the AFP and the NCA [now ACC].<sup>9</sup>

2.12 The ALRC recommendation (though not accepted) argued for the creation of a dedicated corruption prevention/handling body similar to those established by the States.<sup>10</sup>

2.13 The lessons learned from the State bodies, as well as a clearer perspective on the potential for corruption at the Commonwealth level, has given rise to the establishment of an anti-corruption body.

### ***Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006***

2.14 The Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 (AFP Professional Standards Bill) provides a new complaints and professional standards framework for the AFP.

2.15 The central characteristics of the current AFP model of professional standards are contained in the *Complaints (Australian Federal Police) Act 1981* (to be repealed by this Bill), the *Australian Federal Police (Discipline) Regulations 1979* and the Commissioner's Orders. These provisions provide a structured regime of control of police action, which reflects the view that police behaviour is best controlled by rules of conduct enforced by legalistic charges and determined in certain circumstances by the Federal Police Discipline Tribunal.<sup>11</sup>

2.16 In its 1996 review of AFP and (then) NCA complaints and disciplinary systems, the ALRC observed that AFP processes were outdated and unsatisfactory.<sup>12</sup> The ALRC saw as the solution the establishment of a National Integrity and Investigations Commission that would have a dual role for the AFP and NCA – an

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8 Dr A.J. Brown, *Submission 8 (Attachment A)*, pp 1-2.

9 Australian Law Reform Commission, *Integrity: but not by trust alone: Australian Federal Police and National Crime Authority complaints and disciplinary systems*, 1996, ALRC Report No. 82, Recommendation 6.

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

11 Federal Agent Alan Scott, *Professional Standards – charting the way forward*, Platypus Magazine (Australian Federal Police), No. 82, March 2004, p. 36.

12 Australian Federal Police, *Submission 3*, p. 1.

office dealing with complaints and an office dealing with corruption.<sup>13</sup> Additionally, in 2001, the Senate Legal and Constitutional References Committee also recommended that the AFP complaints procedures be 'simplified and made more transparent'.<sup>14</sup>

2.17 In 2002, Justice William Fisher AO QC undertook a review of AFP professional standards (the Fisher Review) at the request of the AFP Commissioner Mick Keelty. Justice Fisher's recommendations centred around the establishment of a 'managerial model' for professional standards rather than a legalistic and formal approach.<sup>15</sup> The Fisher Review observed:

In complaints and discipline matters police services have traditionally tended to focus too much on the aspect of reactive punishment.<sup>16</sup>

2.18 The AFP Professional Standards Bill implements the bulk of the Fisher Review's recommendations.

### **Law Enforcement Integrity Commissioner Bill 2006**

2.19 As stated above, the LEIC Bill establishes ACLEI and the role of the Integrity Commissioner. ACLEI's jurisdiction will initially cover the AFP and the ACC, though other Commonwealth agencies with law enforcement functions may be brought within its jurisdiction by regulation.<sup>17</sup>

2.20 The main purpose of the LEIC Bill is to enhance the integrity of Commonwealth law enforcement agencies by providing independent and effective external investigation of possible instances of corruption in the AFP and ACC.<sup>18</sup> The Bill provides ACLEI with the power to conduct a Royal Commission style investigation and many provisions in the Bill mirror those contained in the *Royal*

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13 Australian Law Reform Commission, *Integrity: but not by trust alone: Australian Federal Police and National Crime Authority complaints and disciplinary systems*, 1996, ALRC Report No. 82, p. 15.

14 Senate Legal and Constitutional References Committee, *Order in the law – The report of the Inquiry into the Management Arrangements and Adequacy of Funding of the Australian Federal Police and the National Crime Authority*, 28 August 2001, p. 137.

15 The Hon. W.K. Fisher AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 97.

16 The Hon. W.K. Fisher AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 59.

17 The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 9.

18 Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006, *Explanatory Memorandum*, p. 1.

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*Commissions Act 1902* and the investigation and hearing powers in the *Australian Crime Commission Act 2002*.<sup>19</sup>

2.21 A total of \$9.5 million was allocated in the 2005-06 Federal Budget – of this, \$0.6 million was allocated to the Attorney-General's Department to fund the establishment of ACLEI and \$8.9 million was allocated to ACLEI.<sup>20</sup>

### ***Part 1 – Preliminary***

2.22 Part 1 outlines the commencement dates (clause 2), objects (clause 3) and application (clause 4) of the Bill.

### ***Part 2 – Interpretation***

2.23 Definitions are contained in clause 5. At clause 6, the Bill provides that the meaning of 'engages in corrupt conduct' is:

...any act or omission which involves the abuse of office as a staff member of a law enforcement agency, or conduct which perverts, or is for the purpose of perverting the course of justice, or, having regard to the staff member's duties and powers, conduct engaged in for the purpose of corruption of any other kind...<sup>21</sup>

2.24 Clauses 7-9 discuss the meaning of the term 'corruption issue' in the context of ACLEI and law enforcement agencies.

2.25 Clauses 10 and 11 identify persons who are considered to be staff members of law enforcement agencies and ACLEI respectively. The Bill treats staff members of the former NCA as if they were staff members of the ACC (clause 12). 'Secondees' are defined in clause 10(5).<sup>22</sup>

### ***Part 3 – The Integrity Commissioner***

2.26 Clause 15 provides for the appointment of an Integrity Commissioner as the statutory head of ACLEI and prescribes his or her functions and powers in investigating corrupt conduct and corruption issues. In carrying out his or her functions, priority must be given to matters involving serious or systemic corruption (clause 16).

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

20 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 3.

21 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 12.

22 See also Attorney-General's Department, *Submission 10*, Answers to Questions on Notice, Question 2.

#### ***Part 4 – Dealing with corruption issues***

2.27 Division 1 outlines the ways in which a corruption issue may be brought to ACLEI's attention – that is, by notification or referral by the Minister or by another agency or person.<sup>23</sup> The Bill creates particular obligations for heads of law enforcement agencies in relation to corruption issues that concern their agency and for custodians of prisoners who may wish to raise a corruption issue.

2.28 Division 2 deals with ACLEI's initial decision about whether to directly investigate a corruption issue or whether it should be investigated by a law enforcement agency. Clause 27 provides a list of factors that ACLEI must consider, including the appropriate balance between its responsibility to investigate corruption issues, and the responsibility of law enforcement agencies to manage their agencies.<sup>24</sup> Division 2 also provides for ACLEI to advise interested parties of the decision and for the possibility of changing the decision at a later stage if there is reason to do so.<sup>25</sup>

2.29 ACLEI will have jurisdiction to investigate allegations of corruption made against, or relating to, State and Territory law enforcement officers who are seconded to a Commonwealth agency (clause 29). ACLEI will share the oversight of State and Territory officers with the relevant integrity agency (clause 30).

2.30 ACLEI must deal with corruption issues that were notified (clause 19) or referred (clauses 18 or 23) in one of the ways listed in subclauses 26(1) and 29(6), or decide to take no further action.<sup>26</sup> ACLEI may conduct an investigation, either alone or jointly with another government agency or State and Territory integrity agency. It may refer a corruption issue to the AFP or other law enforcement agency for investigation, and may manage or oversee an investigation being conducted by a law enforcement agency. ACLEI has further options where the corruption issue relates to a secondee to a law enforcement agency.

2.31 Subdivision C requires ACLEI to advise particular people (for example, Ministers, persons who refer issues and heads of law enforcement agencies) of the decisions made in relation to the corruption issue raised. ACLEI may also initiate its own investigations (subdivision D) and may at any time reconsider how a corruption issue is to be dealt with (subdivision E).

#### ***Part 5 – Information sharing when decision made about how to deal with corruption issue***

2.32 This Part provides mechanisms to ensure that the law enforcement agency which is to investigate a corruption issue has access at the outset to all the available

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23 Law Enforcement Integrity Commissioner Bill 2006, clauses 18, 19 and 23.

24 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 18.

25 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 18.

26 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, pp 19-20.

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information.<sup>27</sup> The Bill provides for information sharing between agencies to ensure effective and efficient investigations.

### ***Part 6 – Investigations by Integrity Commissioner***

2.33 Part 6 sets out basic principles governing the conduct of investigations of corruption issues by ACLEI. ACLEI has the discretion to choose the most suitable approach to each individual matter (clause 48), subject to the Minister's power to order a public inquiry (clause 71).

2.34 ACLEI is required to inform the Minister, the head of the agency concerned, the complainant and – where appropriate – the subject of the investigation, of the initiation, progress and outcomes of the investigation. It must report all findings at the conclusion of an investigation, subject to provisions contained in the Bill ensuring the confidentiality of protected information (clause 149). ACLEI may also report to the Minister and Parliament if it believes that there is a failure by the head of an agency to take adequate remedial action (clauses 55-57).

### ***Part 7 – Investigations by other Commonwealth agencies***

2.35 Part 7 sets out the process and requirements where ACLEI either refers an investigation to a law enforcement agency or is managing (clause 61) or overseeing (clause 62) an investigation by an agency.

2.36 Reporting and notification requirements are set out in Division 3. ACLEI may request progress reports from the agency conducting the investigation (clauses 63 and 64) and must receive a report at its conclusion (clause 66). Upon receipt of the final report, ACLEI may make comments and/or recommendations in writing to the head of the agency concerned (clause 67). ACLEI may request details of actions that the agency plans to take in response to its recommendations and if it is not satisfied with the response of the agency it may refer the matter to the Minister.

### ***Part 8 – Public inquiries into corruption issues***

2.37 The Minister may request that ACLEI conduct a public inquiry into a corruption issue, corruption generally in law enforcement agencies and/or the integrity of staff members of law enforcement agencies (clause 71).

2.38 ACLEI must invite submissions on issues that are the subject of a public inquiry (clause 72) and it is required to submit a report to the Minister at the conclusion of an investigation that includes findings, evidence, action taken or proposed to be taken and recommendations (clause 72).

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27 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 24.

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***Part 9 – Integrity Commissioner's powers in conducting investigations and public inquiries***

2.39 For the purposes of investigating a corruption issue ACLEI has the power to compel the production of documents and things. It can make requests to staff members of law enforcement agencies or to any other person requiring them to provide information or produce documents or things (clauses 75 and 76). ACLEI is allowed to retain documents or things produced for a period necessary for the purposes of the investigation for which they were requested (clause 77).

2.40 The staff member or other person has grounds for non-disclosure where disclosure would, for instance, prejudice Commonwealth/State relations or reveal a confidential source of information relevant to the enforcement of a criminal offence or a civil penalty provision (clause 78).

2.41 If ACLEI requests a legal practitioner to produce documents, information or things, the legal practitioner can refuse if doing so would disclose privileged communications made by, or to, the legal practitioner (clause 79).

2.42 A staff member or person is not excused from complying with a request made under clauses 75 and 76 on the grounds that the production of information or documents requested could incriminate him or her. The privilege against self-incrimination is abrogated in clause 80, although a 'use immunity' is provided in (subclauses 80(2) and (4)). This immunity operates where a staff member of a law enforcement agency, or other person, prior to producing information or documents or things, claims that doing so may tend to incriminate or expose them to a penalty.<sup>28</sup> This means that the information or documents or things will not be admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. The use immunity is not available in five specified circumstances (subclause 80(4)).

2.43 Similarly, a person is not excused on the grounds that answering a question or producing information, documents or things would breach a secrecy provision (except if disclosure would breach a taxation secrecy provision or a law enforcement secrecy provision) (clause 80).

2.44 Clause 80 also provides that a person cannot refuse or fail to comply with a request to answer a question or produce information, documents or things on the grounds that doing so would be contrary to the public interest.

2.45 Division 2 confers powers on ACLEI to hold a hearing for the purpose of investigating a corruption issue or conducting a public inquiry. ACLEI has the power to hold the whole, or part of, a hearing in public or private (subclause 82(3)). It may serve a summons on a person to attend a hearing (clause 83) and may take evidence outside Australia (clause 84).

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28 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, pp 38-39.

2.46 If a summons has been served on a person, ACLEI has a general discretion (limited by subclauses 91(3)-(5)) to include a notation preventing or limiting disclosure of information about the summons or any official matter connected with the summons (subclause 91(2)). This is designed to prevent a disclosure which could lead to the destruction or alteration of evidence, or intimidation of witnesses.<sup>29</sup> According to the Explanatory Memorandum, a specified circumstance allowing disclosure in order to obtain legal advice is likely.<sup>30</sup>

2.47 ACLEI's powers are supported by criminal offences for conduct in the nature of contempt (clause 94).

2.48 ACLEI staff will provide investigative, intelligence and administrative support. For the purpose of conducting investigations ACLEI 'authorised officers' will have the same powers of arrest (Division 5) as a constable of police and will be able to apply for and execute search warrants (Division 4). A search warrant may be issued if there are reasonable grounds to suspect that there is, or will be within 72 hours, evidential material on the premises or person which may be concealed, lost, mutilated or destroyed (clause 109). Subdivision D sets out general provisions about executing a search warrant and subdivisions E and F contain specific provisions about executing a warrant in relation to premises and persons (respectively).

### ***Part 10 – Dealing with evidence and information obtained in investigation or public inquiry***

2.49 ACLEI must provide evidence of an offence or a person's liability to a civil penalty or confiscation proceedings<sup>31</sup> to the relevant authority or person to enable prosecution or the commencement of civil penalty proceedings in appropriate circumstances (clauses 142 and 143; see also clause 148). Prior to providing a person or authority with this evidence, ACLEI must take reasonable steps to consult the head of a relevant agency, unless it is likely that an investigation or subsequent action would be prejudiced by doing so (clause 144).

### ***Part 11 – Attorney-General certificates about release of information***

2.50 The Attorney-General is authorised to prevent the disclosure of information by ACLEI and the Integrity Commissioner on the grounds that it would be contrary to the public or national interest (clause 149).<sup>32</sup> The Attorney-General may issue a certificate prohibiting the disclosure of specific information by specific methods. A certificate may also impact on information sharing between agencies, and the mandatory reporting requirements.

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29 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 49.

30 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 49.

31 Law Enforcement Integrity Commissioner Bill 2006, clause 143.

32 Law Enforcement Integrity Commissioner Bill 2006, *Explanatory Memorandum*, p. 2.

***Part 12 – Dealing with ACLEI corruption issues***

2.51 The Bill includes a procedure for investigating complaints of corruption issues within ACLEI (including the Integrity Commissioner) and provides that the Minister may authorise a special external investigation (clause 156).

2.52 Clause 174 imposes an obligation on all ACLEI staff members (including the Integrity Commissioner) to report corrupt conduct.

***Part 13 – Administrative provisions***

2.53 Part 13 covers administrative issues, including the appointment (clause 175), remuneration (clause 178) and termination (clause 183) of the Integrity Commissioner. Division 2 provides for the appointment of an Assistant Integrity Commissioner and other related issues.

2.54 Division 3 establishes ACLEI (clause 195) and prescribes that its function is to assist the Integrity Commissioner in dealing with corruption issues (clause 196). The Integrity Commissioner may engage consultants (clause 198) and secondees (clause 199).

2.55 ACLEI must give a report to the Minister to be presented in Parliament on the performance of the Integrity Commissioner's functions during each financial year (clause 201).

2.56 Division 5 outlines the confidentiality requirements for ACLEI staff. Exceptions to these requirements are at clauses 208 and 209.

***Part 14 – Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity***

2.57 The Bill creates a Parliamentary Joint Committee (PJC) to oversee the operation of ACLEI and to ensure that it is accountable to Parliament. The PJC must monitor, review and report on any relevant matter that should be directed to the government's attention (clause 215). ACLEI must inform the PJC when requested, of the general conduct of ACLEI operations and provide information related to investigations and inquiries unless the information is clause 149 certified information (clause 216).

2.58 The Bill provides that the PJC must meet in private once each year to receive a brief from the Commonwealth Ombudsman about ACLEI's involvement in controlled operations (clause 218).

***Part 15 – Miscellaneous***

2.59 Part 15 contains miscellaneous provisions, including the Integrity Commissioner's power of delegation (clause 219) and the provision of immunity from civil proceedings for staff members of ACLEI (clause 222). Clause 224 provides that



the Governor-General may make regulations prescribing matters required or permitted by the Bill, or that are necessary or convenient to be prescribed.

### **Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006**

2.60 The Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 (Consequential Amendments Bill) amends a range of Acts as a consequence of the establishment of ACLEI and the appointment of the Integrity Commissioner.<sup>33</sup>

2.61 As a result of the LEIC Bill, it is necessary that ACLEI has investigatory and inquiry powers that will allow it to gather information and evidence to perform its functions.<sup>34</sup> It is also necessary that information be passed between ACLEI and other Commonwealth agencies lawfully, particularly where that information relates to a Commonwealth criminal offence.

2.62 This Bill provides for ACLEI investigators to have access to the full range of special investigative powers, including the capacity to use telecommunications interception, surveillance devices, controlled delivery and assumed identities. It also provides ACLEI with access to a range of otherwise confidential information that is accessible to investigators from other key Commonwealth law enforcement agencies. Lastly, the Bill modifies the *Ombudsman Act 1976* to clarify the relationship between the Commonwealth Ombudsman and ACLEI.

### **Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006**

2.63 The AFP Professional Standards Bill inserts a new part in the *Australian Federal Police Act 1979* (AFP Act) to modernise the complaints and professional standards regime within the AFP. The new part implements a contemporary managerial approach to complaints and professional conduct issues.<sup>35</sup> It provides for a graduated system of categories of conduct to allow for minor complaints to be dealt with by managers and for more serious categories to be investigated by the unit established within the AFP to deal with professional standards concerns.

2.64 The Bill also revises the role for the Commonwealth Ombudsman in relation to professional standards. It gives the Ombudsman:

- the ability to jointly determine, with the AFP Commissioner, the kinds of issues that belong to various categories of conduct;

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33 The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 7.

34 Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006, *Explanatory Memorandum*, p. 1.

35 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 1.

- access to the records that are kept in relation to AFP conduct and practices issues; and
- the role of conducting annual and ad hoc reviews of the operation of the new professional standards system.

2.65 There is no financial impact flowing directly from the provisions of this Bill.<sup>36</sup>

### ***Schedule 1 – Main amendments***

2.66 Schedule 1 amends the AFP Act by inserting a number of definitions. In particular, item 2 expands the current definition of 'AFP appointee' (contained in the *Complaints (Australian Federal Police) Act 1981*) to ensure all persons engaged by the AFP Commissioner, including consultants, independent contractors and persons engaged overseas as employees are covered by the new complaints and professional standards system.

### ***Part V – Professional Standards and AFP conduct and practices issues***

2.67 This part establishes the procedures for AFP conduct issues, AFP practices issues, and other issues related to the AFP are able to be raised and dealt with under the new system.

#### ***Division 1 – Preliminary***

2.68 The AFP Commissioner may determine the professional standards to be complied with by AFP appointees (clause 40RC).

2.69 A unit must be constituted within the AFP to undertake investigations of AFP conduct issues and corruption issues that relate to conduct engaged in by AFP appointees (clause 40RD). The head of the unit is responsible directly to the AFP Commissioner (clause 40RE).

2.70 'AFP conduct issue' is defined broadly and relates to whether an AFP appointee has engaged in conduct that breaches the AFP professional standards or is corrupt conduct (clause 40RH). Conduct that was engaged in before the commencement of this section and conduct for which the statute of limitations has passed are included in the definition.

2.71 'AFP practices issue' is also defined broadly and concerns the practices and procedures of the AFP, both within and outside of Australia (clause 40RI).

2.72 There are three categories of conduct that define what behaviour is able to be the subject of a complaint in relation to a professional standards issue for the purposes of the proposed legislation.

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36 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 1.

- **Category 1 conduct** (least serious) – inappropriate conduct that relates to minor management matters or customer service matters or conduct that reveals a need for improvement by the AFP appointee concerned (clause 40RN).
- **Category 2 conduct** – minor misconduct by an AFP appointee, inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee or repeated instances of category 1 conduct (clause 40RO).
- **Category 3 conduct** – conduct that is serious misconduct by an AFP appointee or that raises the question whether termination action should be taken, or involves a breach of the criminal law or serious neglect of duty by an AFP appointee, and that is not conduct that raises a corruption issue (clause 40RP).
- The highest category of conduct is conduct giving rise to a corruption issue (clause 40RK).

2.73 The AFP Commissioner and the Commonwealth Ombudsman may jointly determine by legislative instrument the kind of conduct that falls within category 1, 2 or 3. If a conduct issue potentially falls into a number of different categories, it will be taken to fall within the highest of those categories.

*Division 2 – Raising AFP conduct and practices issues with the AFP for action under Division 3*

2.74 Any person may give information that raises an AFP conduct or practices issue either to the AFP Commissioner or any AFP appointee, in writing or orally (clause 40SA). The Bill also provides mechanisms for persons in custody to give information (clause 40SB).

2.75 Information given under clause 40SA must be recorded and dealt with in accordance with subclause 40TA(1). There is an exception for category 1 conduct issues or an AFP practices issues (subclause 40SC(2)).

*Division 3 – Dealing with AFP conduct or practices issues*

2.76 The AFP Commissioner may issue orders about how AFP conduct or practices issues and information are to be dealt with by AFP appointees (clause 40TA).<sup>37</sup> The AFP Commissioner's power to make orders is important because the provisions of the proposed Part V set out only key elements of the new regime.

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37 The AFP Commissioner may, by writing, issue orders with respect to the general administration of, and the control of the operations or, the AFP (section 38, *Australian Federal Police Act 1979*).

Most of the remaining administrative details to enable the system to function effectively will be provided by the Commissioner's orders.<sup>38</sup>

2.77 Division 3 also outlines action that can be taken to improve or address the AFP appointee's performance or behaviour – for example, training and development action (clause 40TC), remedial action (clause 40TD) and termination action (clause 40TE).

2.78 Subdivision C provides that category 1 and 2 conduct issues are to be dealt with by a manager who is allocated such an issue. Subdivision D outlines how category 3 conduct issues and corruption issues (in association with ACLEI) are to be dealt with.

#### *Division 4 – Ministerially directed inquiries*

2.79 The Minister has the power to arrange for an inquiry to be held concerning the conduct of an AFP appointee or any matter relating to the AFP (clause 40UA). If the Minister arranges for an inquiry, he or she must inform the Commonwealth Ombudsman, ACLEI and other persons or bodies that the Minister deems appropriate about the details of the inquiry (clause 40UB).

#### *Division 5 – Investigative powers*

2.80 Where a person is investigating a category 3 conduct issue, a corruption issue (under Division 3) or a ministerially directed inquiry (under Division 4), Division 5 provides additional powers to the investigator (clause 40VA).

2.81 The investigator may:

- conduct the inquiry and may obtain information in a manner that he or she thinks fit (subject to the Division) (clauses 40VB and 40VC); and
- enter and search AFP premises for the purposes of an investigation or inquiry (clause 40VF).

2.82 The investigator may direct an AFP appointee to provide information, produce a document or thing, answer a question or do anything else reasonably necessary for the purposes of the investigation or inquiry (clause 40VE). The AFP appointee is not excused from complying with the direction on any ground. The production of information or evidence obtained from the AFP appointee is not admissible in evidence against the AFP appointee in civil or criminal proceedings (with some exceptions). Similar powers are given to an investigator conducting a Ministerially directed inquiry (clause 40VG).

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38 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 12.

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2.83 A number of offences regarding the conduct of AFP appointees with a maximum penalty of six months imprisonment are listed at clause 40VH.

*Division 6 – Record keeping*

2.84 The AFP Commissioner must keep adequate records. There is an exception for category 1 conduct issues that are resolved without being recorded (clause 40WA). Both ACLEI and the Commonwealth Ombudsman are entitled to have access to the records for the purposes of performing their functions (clause 40WA).

*Division 7 – Ombudsman review*

2.85 The Commonwealth Ombudsman's role is to review the administration of Part V (clause 40XA). At least every 12 months the Ombudsman must inspect the records of AFP conduct and practices issues that have been, or are being dealt with, under Divisions 3 and 4. The Ombudsman may also conduct ad hoc inspections (clause 40XB).

2.86 The Commonwealth Ombudsman must prepare an annual report for the Parliament that includes information as to the adequacy of the administration of matters under Divisions 3 and 4 (clause 40XD).

*Division 8 – Offences*

2.87 Division 8 provides that it is an offence:

- to cause, or threaten to cause, detriment to another person on the ground that the person, or another person, gave information for the purposes of Part V (clause 40YA);
- to provide false information about AFP conduct or practices issues (clause 40YB);
- for an AFP appointee to refuse to give the necessary personal details without reasonable excuse, or to give false details, where a person has requested those details for the purpose of making a complaint or raising a conduct issue, and where the AFP appointee was informed of the reason for requesting the details (clause 40YC).

*Division 9 – Secrecy*

2.88 Clause 40ZA applies where a person inappropriately records or communicates information acquired via the investigation or inquiry.



# 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'.<sup>1</sup> 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.

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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'.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> He observed the powers given to police – such as carrying arms and

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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, 8<sup>th</sup> *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](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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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'.<sup>10</sup>

### ***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.<sup>11</sup> 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:

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7 The Hon. Justice James Wood, 8<sup>th</sup> *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](http://www.transparency.org/iacc/8th_iacc/papers/jwood.html) (accessed 28 April 2005).

8 The Hon. Justice James Wood, 8<sup>th</sup> *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](http://www.transparency.org/iacc/8th_iacc/papers/jwood.html) (accessed 28 April 2005).

9 The Hon. Justice James Wood, 8<sup>th</sup> *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](http://www.transparency.org/iacc/8th_iacc/papers/jwood.html) (accessed 28 April 2005).

10 The Hon. Justice James Wood, 8<sup>th</sup> *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](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.<sup>12</sup>

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'.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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).<sup>16</sup> 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'.<sup>17</sup> He also argued that the Commonwealth Ombudsman 'should not be the chief agency responsible for investigating corruption allegations'.<sup>18</sup>

### ***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.

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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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup>

### *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.<sup>23</sup> 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.

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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.<sup>24</sup> As foreshadowed by the Attorney-General, other Commonwealth law enforcement agencies may be brought within ACLEI's jurisdiction by regulation.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

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.

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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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

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.<sup>31</sup>

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.

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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,<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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

3.42 As Dr Brown argued, 'Commonwealth administration is no more inherently immune from corruption risks than equivalent types of officialdom elsewhere'.<sup>37</sup> 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.<sup>38</sup>

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

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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.

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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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup> 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

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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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

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

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42 The Hon. Justice James Wood, 8<sup>th</sup> *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](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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup> 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:<sup>51</sup>

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.<sup>52</sup>

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

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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.

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referral.<sup>53</sup> 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'.<sup>54</sup> Dr Brown suggested that this could easily be rectified by including provisions similar to those in the *Ombudsman Act 1976*.<sup>55</sup>

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.**

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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.<sup>56</sup>

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'.<sup>57</sup> 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.

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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.<sup>58</sup>

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.**

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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.<sup>59</sup> 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.<sup>60</sup>

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

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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.<sup>61</sup>

### *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.<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> 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'.<sup>68</sup> Mr Kearney suggested the insertion of a 'catch-all' provision similar to subsection 18(3) of the *Police Integrity*

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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.<sup>69</sup>

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.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

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

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.<sup>74</sup>

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

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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.



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sensible in the circumstances of each case'.<sup>75</sup> 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.<sup>76</sup>

### ***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.<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> Dr Thom argued that the Bill, as currently drafted, would require the Ombudsman to mount an investigation to seek the information.<sup>80</sup>

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.<sup>81</sup>

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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

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to the excision of sensitive material, outcomes of all public hearings will be forwarded to Parliament.<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup>

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.<sup>85</sup>

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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.<sup>86</sup>

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.<sup>87</sup>

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

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

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

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

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.<sup>89</sup>

### *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

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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.<sup>90</sup>

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 AC. 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.<sup>91</sup>

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.<sup>92</sup> 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'.<sup>93</sup>

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.<sup>94</sup>

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.<sup>95</sup>

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

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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.

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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.<sup>96</sup>

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.

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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*.<sup>97</sup> 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.<sup>98</sup>

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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'.<sup>99</sup>

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.<sup>100</sup> 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...<sup>101</sup>

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.<sup>102</sup>

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.<sup>103</sup> '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.<sup>104</sup>

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'.<sup>105</sup> Thus, substantially the same definition of corruption should be used as

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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.<sup>106</sup>

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.<sup>107</sup>

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)*.<sup>108</sup>

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.<sup>109</sup>

### ***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.

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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.

# CHAPTER 4

## KEY ISSUES – AFP PROFESSIONAL STANDARDS

### Background

4.1 This chapter considers the main issues and concerns raised in the course of the committee's inquiry in relation to the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 (AFP Professional Standards Bill).

### *The Fisher Review*

4.2 The proposals contained in the Bill are based on the results of a 2003 review of Australian Federal Police (AFP) professional standards undertaken by Justice William Fisher AO, QC (known as the Fisher Review). The Fisher Review focused on the means by which police administrators could achieve real discipline to increase and enhance performance.

4.3 In his second reading speech the Attorney-General, the Hon. Philip Ruddock MP, explained that the Fisher Review<sup>1</sup> found that the AFP's current disciplinary system was inconsistent with modern management practices and the organisational needs of the AFP, and that its focus on punitive outcomes, adversarial structure and formalised processes has caused delay and unnecessary dispute.<sup>2</sup>

4.4 In identifying the problems with the current AFP system, the Fisher Review noted that contemporary policing in the AFP was based on a model characterised by '... strong notions of rank, subordination, command, control and discipline'.<sup>3</sup>

4.5 The Review made 23 recommendations. These included general principles, focusing on adopting the principles of the managerial or administrative approach to professional standards.<sup>4</sup> The Review further recommended repeal of the *Complaints (Australian Federal Police) Act 1981* (Complaints Act) and the related Commissioner's Orders 5 and 6 (with the latter to be replaced by a new Commissioner's order to underpin a new AFP complaints management model).<sup>5</sup>

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1 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003.

2 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 7.

3 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 35.

4 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 97.

5 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 97.

4.6 Other important recommendations of the Review included:

- Inserting a new division in the *Australian Federal Police Act 1979* (AFP Act) to include a detailed complaints regime with clear definitions of the conduct to which the new division of the Act applied. The new division should not apply to conduct that is lawful and private.
- There should be a statutory definition of 'non-reviewable action', which would apply to complaints such as those of 'unsatisfactory performance'.
- The availability of a range of options for non-reviewable actions ranging from the educational (coaching, mentoring) to behavioural (counselling, reprimand) to structured change (change of duties, transfer) and a recording of temporary or permanent adverse findings.
- Provision for the Commonwealth Ombudsman to intervene and examine any matter to ensure it is dealt with appropriately.

***The new complaints and professional standards system***

4.7 The AFP Professional Standards Bill aims to modernise the complaints and professional standards system for the AFP. To this end, and consistent with the findings of the Fisher Review, the Bill proposes a more modern managerial approach to replace the hierarchical disciplinary regime currently provided under the Complaints Act, which the Bill repeals.<sup>6</sup>

4.8 The new complaints and professional standards systems provide for a graduated system of categories of conduct, ranging upwards in seriousness from categories 1 to 3 and an additional higher category being conduct giving rise to a corruption issue.<sup>7</sup> The types of matters that fall into each category are described only in general terms in the AFP Professional Standards Bill.

4.9 The new AFP complaints and professional standards system would differ from the current model by allowing:

- all complaints, including those made by AFP officers, to be categorised by the level of seriousness;
- minor complaints – such as rudeness – to be dealt with by managers quickly and informally (for example, in the context of performance agreements); and
- more serious complaints – including conduct such as assault or persistent low-level misconduct – to be investigated by the unit to be established within the

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6 Australian Federal Police, *Submission 3*, p. 3; Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 26.

7 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 9.

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AFP to deal with professional standards concerns.<sup>8</sup> All serious complaints could lead to employment action being taken against the officer.<sup>9</sup>

### *The complaints process*

4.10 In evidence, questions were raised about the how the complaints process would operate in the new professional standards framework, and in particular, on the operation of proposed Division 2, which relates to the mechanisms for raising AFP conduct with the AFP.<sup>10</sup>

4.11 The committee was advised that the AFP is currently re-drafting the internal guidelines on the professional standards framework to accommodate the proposals in the Bill. The options proposed for an officer making a complaint would be:

- To give the information to another AFP appointee outside of the work area, which may include giving the information directly to Professional Standards.
- To record the information directly pursuant to proposed section 40SC. (The AFP will be implementing an online web-based complaint recording system available to all AFP appointees to record and manage complaints. This includes the ability to self report breaches of professional standards.)
- To give the information to a member of the AFP's Confidante program, who will act as a support person for the affected AFP appointee and assist throughout resolution of the matter.<sup>11</sup>

4.12 There are also processes for external and isolated posts. These procedures are designed to ensure that the complaint is managed externally; AFP appointees also are further protected by proposed section 40YA which creates an offence of victimisation.<sup>12</sup>

### *Ombudsman's role*

4.13 The Bill also confers a revised role for the Commonwealth Ombudsman in relation to professional standards. First, it designates the Commonwealth Ombudsman as the Law Enforcement Ombudsman, a role that includes the oversight of complaints handling and conduct issues in the AFP and the investigation of matters.<sup>13</sup>

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8 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, clause 40RD.

9 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, *Explanatory Memorandum*, p. 1; Commonwealth Ombudsman, *Submission 4*, p. 2.

10 *Committee Hansard*, 27 April 2006 p. 32.

11 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 13.

12 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 13.

13 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 26.

4.14 Second, it gives the Ombudsman the ability to jointly determine, with the AFP Commissioner, the kinds of issues that belong to various categories of conduct.<sup>14</sup> On a practical level, the Bill removes the need for the Ombudsman to be involved in all complaints, which it was argued, would allow it to focus on more serious complaints and systemic issues.<sup>15</sup>

### **Reactions to the proposal**

4.15 Reactions to the Bill have been essentially positive.

4.16 Commissioner Keelty told the committee that both the AFP appointees<sup>16</sup> and complainants<sup>17</sup> stand to benefit from the new system. These benefits include:

- improved timeliness in resolving minor matters for both AFP appointees and complainants;
- results which aim to improve police conduct, as well as reducing the possibility of the conduct recurring; and
- improvements in performance oversight and management.<sup>18</sup>

4.17 The Commonwealth Ombudsman stated that the office had been 'closely involved' in the development of the AFP Professional Standards Bill and that they supported the 'more streamlined approach to handling complaints against the AFP'.<sup>19</sup>

4.18 Similarly, it was argued by the Commonwealth Ombudsman that the new complaints and professional standards system would be 'more flexible and efficient' than the present approach which was described as 'a product of the thinking in the 1980s which required that precise rules be set down to cover every possible circumstance'.<sup>20</sup>

4.19 From the Ombudsman's perspective, the Bill would:

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14 The new AFP complaints and disciplinary system allows all complaints to be categorised by level of seriousness. The types of matters that fall within each of the categories are described in very general terms in the Bill, with specific matters within each category to be agreed between the AFP Commissioner and the Commonwealth Ombudsman; Dr Vivienne Thom, *Committee Hansard*, 27 April 2006, p. 23.

15 Commonwealth Ombudsman, *Submission 4*, p. 3.

16 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, item 2.

17 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, item 13.

18 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 26.

19 Commonwealth Ombudsman, *Submission 4*, p. 3; Dr Vivienne Thom, *Committee Hansard*, 27 April 2006, p. 23.

20 Commonwealth Ombudsman, *Submission 4*, p. 2; Dr Vivienne Thom, *Committee Hansard*, 27 April 2006, p. 23.

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- increase efficiency by removing the need to be involved in all complaints – this would allow the Ombudsman to dedicate increased resources to more serious and systemic matters; and
  - allow for improvements in its oversight role because of the new audit function and the new focus on practice and procedure – this would provide the Ombudsman with opportunities to look at broader administrative practices within the AFP.<sup>21</sup>

4.20 The Australian Police Federation of Australia (AFPA) is more critical in its assessment of the Bills. While generally supporting the proposed changes, the Association does not believe that the Bill covers all the required areas adequately and thus, should not be passed in its current form.<sup>22</sup>

4.21 In evidence, Mr James Torr, Chief Executive Officer of the AFPA, emphasised the importance of managing the new system effectively. He explained that no other area of management has so much potential to disenfranchise employees if mismanaged: a mishandled complaint or misconduct allegation, can damage the morale of not only the officer concerned, but also engender cynicism and negativity across the whole work team.<sup>23</sup>

4.22 The main concern of the AFPA is that the proposed changes in the Bill do not fully implement the recommendations of the Fisher Review and that it had 'glaring omissions that impact quite onerously on the rights of AFP employees'.<sup>24</sup> In particular, the AFPA submission argues that:

- the recommendations of Justice Fisher have not been interpreted in the light of the changes in the industrial environment since 2003;
- non-reviewable outcomes have a punitive action against the employee;
- the AFP tribunal has been removed, but there is no clear indication that AFP regulation 24 still applies to AFP employment decisions (regulation 24 provides that a process for review of employment decisions must exist at all times);<sup>25</sup>
- there are no reviewable actions in the new structure, as envisaged by Justice Fisher;

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21 Commonwealth Ombudsman, *Submission 4*, pp 3-4.

22 Australian Federal Police Association, *Submission 6*, p. 2.

23 *Committee Hansard*, 27 April 2006, p. 17.

24 Australian Federal Police Association, *Submission 6*, p. 5.

25 Australian Federal Police Association, *Supplementary Submission 6A*, Answers to Questions on Notice, p. 3; AFPA argued strongly for the inclusion of AFP regulation 24 review mechanisms within the AFP Act.

- professional standards can be used as an umbrella to incorporate employment related actions to usurp the application of the *Workplace Relations Act 1996*; and
- the new structure needs more refinement and specificity in its powers and application to avoid the possibility of abuse and misuse by those empowered within it.<sup>26</sup>

4.23 In relation to the Ombudsman, the AFPA hoped that the change of focus would mean that the Ombudsman's office would become 'more effective in dealing with complaints at the senior level' of the AFP.<sup>27</sup> In evidence, Mr Torr argued:

Many of our members currently see the Ombudsman as their last line of defence of what they might perceive as mismanagement, but it does not translate that way. With all due respect to that office and that role, it has not proven effective in dealing with complaints about senior level police.<sup>28</sup>

4.24 The exact extent to which the recommendations of the Fisher Review were incorporated into the Bills was unclear. The Attorney General's Department indicated in evidence that 'pretty much all' of the recommendations had been implemented, but the committee sought clarification.<sup>29</sup>

4.25 The Department took the question on notice and sent the committee a detailed response. In summary, the Department indicates that the Bill implements 15 of the Fisher Review's 23 recommendations. The recommendations which were partially implemented or implemented with some variation, include recommendations 7, 9 and 15. Broadly, these deal with the conduct and complaints investigation process, and the role of the professional standards unit. Notable is the fact the Justice Fisher saw no reason to include 'minor management matters' in the legislation. He said:

9.2 This category of complaint should be called 'minor management matters', which reflects the idea that it incorporates customer service matters as well as other minor management issues.

9.3 These managerial resolutions should not be treated as complaints in the true sense as they would fall outside the normal operation of the legislative structure for complaints. They should be an exception to the normal operation of the complaints provisions of the AFP Act.<sup>30</sup>

4.26 However, the Attorney General's Department notes that 'all professional conduct issues, are captured within the Bill'. Category 1 and 2 matters will not be

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26 Australian Federal Police Association, *Submission 6*, p. 5.

27 Australian Federal Police Association, *Supplementary Submission 6A*, Answers to Questions on Notice, pp 2-3.

28 Mr James Torr, *Committee Hansard*, 27 April 2006, p. 21.

29 Mr Michael Manning, *Committee Hansard*, 27 April 2006, pp 35-36.

30 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 99.



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subject to formal investigation by the professional standards unit or to direct intervention by the Ombudsman.<sup>31</sup>

4.27 The Department also advised the committee that two recommendations – 3 and 17 – are to be implemented by administrative action. Fisher recommendation 3 concerns the repeal of the Commissioner's orders, which the Department indicates 'is a matter for the Commissioner, but the Commissioner is expected to implement this recommendation when the new legislative framework is in place.'<sup>32</sup> Fisher recommendation 17 concerns the unification of the areas of Professional Standards and Employment Standards.

4.28 The committee was also advised that Fisher 'Recommendations 12, 16 and 23 will be implemented in part by the Bill and in part by administrative action'.<sup>33</sup> Recommendation 12 deals with the non-reviewable matters and the process of assignment for investigation. Recommendation 16 deals with the recording of complaints and the role of the Ombudsman, and recommendation 23 deals with the appointment and function of the Overseas Liaison Officer.

### ***Committee view***

4.29 On this matter, the committee makes the observation that there is no obligation *per se* for the government to implement the Fisher recommendations as a whole. Nevertheless, several matters require further consideration, in particular:

- the provisions relating to the categorisation of complaints;
- the provision for review of decisions;
- the resources available to the Commonwealth Ombudsman; and
- the application of professional standards to the Commissioner.

### **Categorisation of complaints**

4.30 A technical matter that arises in the Bill is the potential problem caused by the omission of any specified timeframes for the joint categorisation of complaints by the Commissioner and the Commonwealth Ombudsman.

4.31 As outlined above, the AFP Professional Standards Bill proposes that the complaints system include a graduated scheme for categorising complaints. Minor complaints would be dealt with by managers as performance issues and would attract category 1 classification (clause 40RN). Category 2 conduct includes minor misconduct or repeated instances of category 1 conduct (clause 40RO). The most serious matters would fall into category 3 (clause 40RP). It should be noted that

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31 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 15.

32 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 15.

33 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 15.

conduct falling within category 3 does not raise a corruption issue but could give rise to termination (which is dealt with in conjunction with ACLEI and the Integrity Commissioner).

4.32 Clause 40RM provides for the AFP Commissioner and the Commonwealth Ombudsman to determine jointly, by legislative instrument the kind of conduct that falls into categories 1, 2 or 3. The AFPA observed that there is no obligation for the Commissioner and the Ombudsman to categorise conduct under clause 40RM within a specified time.<sup>34</sup> The AFPA was particularly concerned that if no determination were in place when (and if) the Bill commenced, all conduct for the purpose of AFP professional standards system would be categorised by default as category 3.<sup>35</sup> On this point, the AFPA recommended:

The 'automation' needs to be taken out of s40RM (2)... There needs to be a decision at the Commissioner or delegated level to proceed down the CAT3 [category 3] path. There also needs to be an obligation to categorise all uncategorised conduct as it arises.<sup>36</sup>

4.33 In evidence, the committee was told by a representative of the Australian Federal Police that it was 'most unlikely' that subclause 40RM(2) would operate as an automatic provision and that 'detailed work' had been undertaken jointly by the AFP and the Commonwealth Ombudsman on the issue.<sup>37</sup>

4.34 A related concern focused on the potential for misuse of managerial action 'as punitive action' in relation to category 1 conduct.<sup>38</sup> AFPA argued, for example, that training and development action<sup>39</sup> taken in relation to category 1 conduct could be an arrangement with 'considerable punitive effect' due to loss of remuneration from requiring a person to undertake different daily activities.<sup>40</sup>

4.35 In response, Commissioner Keelty strongly argued that training and development action was not intended to be used as a 'de facto punishment' and that the real issue was about 'applying management strategies to change behaviour'.<sup>41</sup>

4.36 Similarly, an Attorney-General's Department representative said that although the framework established by the Bill gives discretion to AFP management regarding

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34 Australian Federal Police Association, *Submission 6*, p. 10.

35 Australian Federal Police Association, *Submission 6*, p. 10.

36 Australian Federal Police Association, *Submission 6*, p. 11.

37 Federal Agent Allan Scott, Manager, People Strategies, Australian Federal Police, *Committee Hansard*, 27 April 2006, p. 37.

38 Australian Federal Police Association, *Submission 6*, p. 3; Mr Ian Phillips, Director Legal, Australian Federal Police Association, *Committee Hansard*, 27 April 2006, p. 20.

39 Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006, clause 40TC.

40 Mr James Torr and Mr Ian Phillips, *Committee Hansard*, 27 April 2006, p. 20.

41 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 38.

the appropriate corrective avenue for behaviour, he did not accept that there was any risk of this mechanism being used to inappropriately impose a 'significant pecuniary element'.<sup>42</sup> The Department undertook to provide further information, and this was provided.

4.37 The Department indicated that the proposed subsection 40TC(1) applies to category 1 conduct that has occurred.<sup>43</sup> While not providing complete protection against pecuniary loss, the Department considers:

It is implicit in these provisions that the action taken must be proportional to the conduct to which it is a response and that any impact other than improvement in the appointee's performance must be genuinely coincidental.<sup>44</sup>

4.38 It would be inappropriate (according to the Department) to offer any guarantee that an appointee will suffer no pecuniary loss as a result of training and development action, as this would be a result of underperformance or misconduct by the AFP officer concerned. In deciding what is appropriate to effect the necessary changes in behaviour, the AFP should take into account 'potential side-effects such as pecuniary loss... but they should not deter a manager from taking action that is clearly required'.<sup>45</sup>

4.39 The Department notes the Commissioner's undertaking at the hearing on 27 April 2006 'that the AFP will ensure through its internal guidelines that the application of these outcomes is not used to impose pecuniary penalties'.<sup>46</sup> The Department also advised the committee that the Professional Standards unit will have an oversight role to ensure that these guidelines are properly and consistently applied throughout the AFP.

### ***Committee view***

4.40 The committee notes the response to the issue of applying pecuniary penalties, and the assurances by the Commissioner of internal controls on the regime for dealing with professional issues and complaints.<sup>47</sup> The committee acknowledges that the proposals are designed to manage conduct issues efficiently, and that to over prescribe the rectification of these matters, especially at the lower levels would reinstate the bureaucratic arrangement which this legislation is designed to overcome.

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42 Mr Craig Harris, *Committee Hansard*, 27 April 2006, p. 38.

43 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

44 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

45 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

46 Attorney General's Department, *Submission 11*, Answers to Questions on Notice, Question 16.

47 *Committee Hansard*, 27 April 2006, pp 38-39.

4.41 In relation to the categorisation of unacceptable conduct, the committee notes the terms of the proposed section state that the AFP Commissioner and the Commonwealth Ombudsman 'may' make a joint determination regarding the categories of conduct. As such, there is no obligation to complete this in a specified time, or indeed any obligation to do it at all.

4.42 While the committee acknowledges that the risk of this occurring is minimal, the fact remains that if, in the absence of a determination by legislative instrument, all matters become category 3 conduct, the purpose of the Bill in simplifying and professionalising the AFP conduct scheme would be defeated.

4.43 As such, it is a matter that should be rectified by amendment.

### **Recommendation 12**

**4.44 The committee recommends that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 be amended to provide that a determination on categories of conduct shall be made by the Commonwealth Ombudsman and the Commissioner of the Australian Federal Police within three months of the commencement of the Act.**

### **Review of decisions**

4.45 The AFPA is also concerned by the limited extent to which the Bill incorporates the review mechanisms envisaged by the Fisher Review.

4.46 In his review, Justice Fisher recommended that behavioural or performance problems be addressed through what he called 'non-reviewable managerial outcomes'. The process would involve a delegate of the Commissioner appointing a manager to investigate the issue, and report to the delegate for a final decision. An example of this process is set out in the *Police Service Act 1990* (NSW).<sup>48</sup> Fisher then sets out a hierarchy of appropriate actions to rectify the matter.

4.47 More serious matters (breaches of the criminal law, serious abuse of power or neglect of duty and matters raising employment suitability) would be dealt with by a dedicated professional standards office.

4.48 All complaints (including minor management matters) would be monitored by the Commonwealth Ombudsman who would have power to intervene in certain circumstances.<sup>49</sup>

4.49 The Fisher review also considered that in the more serious professional standards matters, decision making would still be subject to review by the Federal

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48 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, pp 66-67.

49 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 68.

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Court under either section 39B of the *Judiciary Act 1903* or the *Administrative Decisions (Judicial Review) Act 1977*. He concluded that the jurisdiction of the Australian Industrial Relations Commission (AIRC) to review employment related decisions would not be affected.<sup>50</sup>

### ***Provisions of the Bill***

4.50 The Bill has been drafted in a different employment landscape from that which operated when the Fisher Review was completed, which raises issues as to its operation within the revised workplace relations system.

4.51 The Bill does not provide the kind of external review mechanisms anticipated by the Fisher review, but instead attempts to compensate for this by reworking the role of the Ombudsman. However his active participation is limited only to serious matters. The Ombudsman noted in his submission that the current arrangement in which he is required to oversee all matters has resulted in a 'disproportionate amount of resources being dedicated to minor matters...the proposals...would allow the Ombudsman to focus on more serious and systemic matters'.<sup>51</sup>

4.52 The Ombudsman notes that while he will be notified of serious complaints he has discretion whether to oversee them. In his submission he observes that the new focus on practice and procedure allows him to examine AFP administrative practice, 'subject to resources'. He indicates that he intends 'to undertake a greater number of own-motion investigations, to improve strategies for identifying systemic issues, for instance through statistical analysis, and to provide greater oversight of investigations into serious allegations'.<sup>52</sup>

4.53 Effectively though, there are no review mechanisms in the Bill for the less serious category 1 or 2 matters, and it is arguable whether there is any recourse for category 3 matters.

### ***Concerns about absence of review***

4.54 The AFPA argued that, by not fully implementing the findings of the Fisher Review, the Bills do not provide proper independent external review of such matters as dismissal decisions or decisions involving financial penalties or punitive outcomes; nor internal appeal avenues for non-reviewable matters.<sup>53</sup>

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50 The Hon. W.K. Fisher, AO QC, *A Review of Professional Standards in the Australian Federal Police*, Commonwealth of Australia, 2003, p. 75.

51 Commonwealth Ombudsman, *Submission 4*, p. 3.

52 Commonwealth Ombudsman, *Submission 4*, p. 4.

53 Australian Federal Police Association, *Submission 6*, pp 4-5; Mr James Torr, *Committee Hansard*, 27 April 2006, p. 17.

4.55 In evidence, representatives from AFPA stressed that external review mechanisms were vital for ensuring accountability and transparency within the AFP.

Everyone in the AFP needs to embrace accountability, including the Commissioner.... On that basis, we call for an external review panel, tribunal or court, as envisaged by the Fisher review and as is found in all other Australian police forces bar none.<sup>54</sup>

4.56 In relation to lower level management decisions, Mr Phillips also drew a comparison between the Bill and the disciplinary model that exists in the NSW Police Force that allows for independent review.<sup>55</sup>

4.57 The AFPA also argued that the Bill presents the additional danger that the use of the 'professional standards rubric' could blur the edges of what is considered to be a professional standards issue versus an employment or management issue.

4.58 The proposed change to paragraph 69B (1) (b) of the AFP Act, would limit the operation of the *Workplace Relations Act 1996* (WRA). As a result, the AFPA claims that action in relation to a matter under the new professional standards system would be excluded from the WRA and that the change would be 'considerably onerous' on AFP appointees because of the potential for certain managerial decisions to 'become professional standards actions for the purpose of usurping the WRA'.<sup>56</sup> The AFPA's submission questioned whether the decision to terminate would then be reviewable under the WRA.

4.59 The Attorney-General's Department rejected this analysis, arguing that the AFP Professional Standards Bill would still allow termination decisions to be taken to the AIRC,<sup>57</sup> except decisions to terminate employment by reason of serious misconduct.<sup>58</sup> It was further argued that it remained appropriate for decisions of the AFP Commissioner relating to corruption to have this exemption in order to avoid an 'unproductive review path'.<sup>59</sup> Commissioner Keelty further noted that, in exercising such powers within the last five years, he exercised the discretion personally and did so carefully and with 'due consideration'.<sup>60</sup>

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54 Mr James Torr, *Committee Hansard*, 27 April 2006, p. 17.

55 Mr Ian Phillips, *Committee Hansard*, 27 April 2006, p. 18, Australian Federal Police Association, *Submission 6*, pp 14-15.

56 Australian Federal Police Association, *Submission 6*, p. 18; Mr Ian Phillips, *Committee Hansard*, 27 April 2006, p. 21.

57 Mr Michael Manning, *Committee Hansard*, 27 April 2006, p. 36.

58 *Australian Federal Police Act 1979*, sections 28 and 40K; Federal Agent Alan Scott, *Committee Hansard*, 27 April 2006, p. 37.

59 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 37.

60 Commissioner Mick Keelty, *Committee Hansard*, 27 April 2006, p. 37.

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### *Committee view*

4.60 The committee notes that the AFP Professional Standards Bill is intended to streamline the disciplinary process within the AFP. It appears that the Fisher Review has provided a basis for this, and the AFP Commissioner is to be commended for personally initiating the Review process.

4.61 The committee also notes the revised role of the Ombudsman, and that there is some scope for him to review all matters relating to professional conduct and complaints.

4.62 However, the committee notes that efficiency of administration should not compromise procedural fairness. Any complaint about an employee whether proved or not, can affect not only the employee, but the workplace as well. At the same time, there is no point in compromising the administration, and adding layers of responsibility which may have no discernable result.

4.63 The committee considers that the lower level disciplinary matters should be subject to internal review while more serious matters should be the subject of external review for example, through the Administrative Appeals Tribunal.

4.64 The issues surrounding a possible conflict with the *Workplace Relations Act 1996* represent a potentially serious problem. Although the Attorney-General's Department indicated that the matter of recourse to the AIRC is being examined, the committee considers that any conflict which may serve to preclude a person who has been dismissed having recourse to the AIRC should be resolved before the Act commences.

### **Recommendation 13**

**4.65 The committee recommends that the lower level disciplinary matters (categories 1 and 2) should be subject to internal review while more serious matters (category 3) should be the subject of external review for example, through the Administrative Appeals Tribunal.**

### **Recommendation 14**

**4.66 The committee also recommends that the possible conflict of the Bill with the *Workplace Relations Act 1996* be resolved, before the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 is enacted.**

### **Commonwealth Ombudsman**

4.67 The Commonwealth Ombudsman noted that its resources and funding requirements need to be reviewed in light of its additional responsibilities and change of focus under the Bill.

It is expected that the creation of a new Law Enforcement Ombudsman role, with a new audit function and the development of an enhanced own

motion program, with the requirement to report at least annually, will place additional demands on my office.<sup>61</sup>

4.68 Dr Thom from the Office of the Ombudsman added:

I think the concern might be that we focus the resources on the complaints rather than doing own motion investigations. So you can deal reactively with the things that come in, but you do not proactively look at systemic issues, and that would be a concern for us.<sup>62</sup>

4.69 In commenting on the demands on the operation of the Ombudsman's office, a representative from the Attorney-General's Department said that he had not received any indication that the legislative changes would affect current resources, but undertook to examine the issue.<sup>63</sup>

### ***Committee view***

4.70 The committee notes that AFP Professional Standards Bill and its companion Bills do appear to place additional responsibilities on the Commonwealth Ombudsman.

4.71 The committee considers it essential that the steadily widening jurisdiction of the Ombudsman does not erode the effectiveness of the office's capacity to scrutinise agencies' actions. As such, funding must keep pace with responsibilities. The committee urges the government to review the funding of the Ombudsman during forthcoming budgets to ensure this occurs.

### **Coverage of professional standards**

4.72 The AFP Professional Standards Bill gives the AFP Commissioner the power to determine the professional standards to be complied with by AFP appointees (clause 40RC). However, the AFPA suggested that the Bill, as currently drafted, does not appear to subject the Commissioner to the new professional standards system contained in Part V.

There is nothing that expressly excludes the Commissioner from following the professional standards of the AFP, likewise however, there is nothing to expressly include the Commissioner under the regime.<sup>64</sup>

4.73 The committee considers that there is no doubt that the professional standards regime should – and is intended to – apply to the Commissioner. The provisions should be reviewed to remove any doubt on this point.

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61 Commonwealth Ombudsman, *Submission 4*, p. 4.

62 *Committee Hansard*, 27 April 2006, p. 25.

63 Mr Craig Harris, *Committee Hansard*, 27 April 2006, p. 32.

64 Australian Federal Police Association, *Submission 6*, p. 8.



**Recommendation 15**

**4.74 The committee recommends that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 clarify that the professional standards regime applies to the Commissioner of the Australian Federal Police.**

**Senator Marise Payne  
Committee Chair**



# ADDITIONAL COMMENTS BY THE AUSTRALIAN LABOR PARTY

1.1 The Australian Labor Party (Labor) Senators agree with the committee's majority report and broadly endorse the committee's comments and recommendations. However, the Labor Senators wish to make some additional comments in relation to a number of issues – ACLEI's limited jurisdiction, the implementation of the Fisher Review and the impact of the new Australian Federal Police (AFP) professional standards system on 'AFP appointees'.

## **Law Enforcement Integrity Commissioner Bill 2006**

1.2 The Labor Senators consider that ACLEI's jurisdiction, as currently proposed in the Law Enforcement Integrity Commissioner Bill 2006, is too limited. We strongly question how the Federal Government will enhance the Commonwealth's anti-corruption capacities if ACLEI's oversight role is restricted to the AFP and the Australian Crime Commission (ACC). Other Commonwealth law enforcement agencies and agencies with major law enforcement functions should be regarded as relevant. Such agencies include, but are certainly not limited to, the Australian Customs Service, the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Transaction Reports and Analysis Centre (Austrac). These agencies increasingly wield powers that have previously been characterised as police powers – for example, the power of arrest and the use of search warrants. Rather than the 'specialist brief' proposed, Labor agrees with Dr A.J. Brown who argued that ACLEI should be given a 'broad mandate to uncover maladministration or corruption wherever found'.<sup>1</sup>

## **Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006**

1.3 First, the Labor Senators note that the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 implements the majority – in whole or in part – of the 2003 Fisher Report's recommendations with respect to AFP professional standards.<sup>2</sup> In relation to recommendation 23, Labor notes and supports the proposed Government amendment to clarify the law around the AFP Commissioner's

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

2 The Attorney-General's Department stated that the Bill implements recommendations 1, 2, 4, 5, 6, 8, 10, 11, 13, 14, 18, 19, 20, 21 and 22. It implements recommendations 7, 9 and 15 with some variation. Recommendations 3 and 17 will be implemented by administrative action. Recommendations 12, 16 and 23 will be implemented in part by the Bill and in part by administrative action (Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 15).

'assignment of duties' power in section 40H of the *Australian Federal Police Act 1979*.<sup>3</sup>

1.4 Second, the new complaints and professional standards system is supported by the Labor Senators and is long overdue, however we believe that the committee's comments and recommendations do not go far enough to protect of the rights of 'AFP appointees' (particularly since the Bill gives a lot of discretion to AFP management to make certain decisions to correct behaviour of the AFP appointee involved). We do recognise the undertaking by AFP Commissioner Mick Keelty to address the use of this managerial discretion in the AFP's internal guidelines on the professional standards framework, however, Labor believes more needs to be done.

1.5 Labor believes in instances where punitive or pecuniary effects are a consequence of disciplinary action some method of review would be appropriate to avoid unjust or disproportionate outcomes

**Senator Patricia Crossin**

**Senator Linda Kirk**

**Deputy Chair**

**Senator Joseph Ludwig**

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3 Attorney-General's Department, *Submission 11*, Answers to Questions on Notice, Question 15 – Attachment A, p. 15.

# MINORITY REPORT BY THE AUSTRALIAN DEMOCRATS

- 1.1 The Democrats agree with the evidence as presented in the Chair's report.
- 1.2 We commend the Chair and the Secretariat for their efforts.
- 1.3 The Democrats applaud any moves to reduce corruption within Government law enforcement agencies and believe that the Law Enforcement Integrity Commissioner Bill 2006 is an important step in the protection of the integrity of our law enforcement agencies.
- 1.4 The Democrats are dismayed at the lack of jurisdiction given to the Integrity Commissioner.
- 1.5 Corruption can be an unfortunate side effect of power and responsibility and has the potential to pervade any area where that power and responsibility is exercised. It is crucial to responsible government that all measures are taken to prevent corruption occurring and the Federal Government should lead by example.
- 1.6 The Democrats believe that the proposed Integrity Commission should be given general jurisdiction to investigate all Commonwealth agencies with law enforcement functions as is currently the case in New South Wales, Queensland and Western Australia and their respective agencies.
- 1.7 Dr A.J. Brown, Senior Lecturer and Senior Research Fellow at Griffith University stated;
- Unless broadened, the restricted jurisdiction of the proposed Integrity Commission will represent a missed opportunity to properly strengthen the public integrity regimes of the Commonwealth Government in a manner which comparative research indicates is now overdue.<sup>1</sup>
- 1.8 The benefits of widening the jurisdiction of the Commission were also recognised by the Commissioner for the Australian Federal Police who stated:
- If we are serious about this, and if it is not just a quick fix, then the AFP could benefit in its investigations if the ACLEI had a wider remit than what is proposed in the bill.<sup>2</sup>
- 1.9 Recognising that preventative measures are preferable to punitive measures, the Democrats believe that the Bill should encourage corruption resistance measures and training to become a substantive part of the Commission's function.

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<sup>1</sup> Dr A.J. Brown, *Submission 8*, p. 2.

<sup>2</sup> *Committee Hansard*, 27 April 2006, p. 30.

1.10 In order to maintain fair and equitable standards the Democrats believe that officers who receive disciplinary measures should have some form of appeals process available to them, especially in the instance of dismissal.

### **Recommendation 1**

**That the scope of the Integrity Commission's jurisdiction be broadened to encompass other law enforcement agencies such as the Australian Taxation Office, the Australian Customs Service, the Australian Securities and Investment Commission and the Department of Immigration.**

### **Recommendation 2**

**That more specific provisions are introduced into the Bill in order to establish a corruption resistance regime within the Integrity Commission.**

### **Recommendation 3**

**That an independent tribunal or review board be set up to deal with any serious grievances a member of the AFP may have with regard to their employment in order to bring the AFP in line with other State police forces.**

**Senator Natasha Stott Despoja**

**Australian Democrats**

# APPENDIX 1

## SUBMISSIONS RECEIVED

1	Mr Glenn Ross
2	Police Integrity Commission
2A	Police Integrity Commission
3	Australian Federal Police
4	Commonwealth Ombudsman
5	Police Integrity Commission of NSW
6	Australian Federal Police Association
6A	Australian Federal Police Association
7	Police Federation of Australia
8	Dr A.J. Brown
9	Crime and Misconduct Commission Queensland
10	Transparency International Australia
11	Attorney-General's Department

## TABLED DOCUMENTS

*Documents tabled at the public hearing on 27 April 2006*

### **Australian Federal Police Association**

- The First Casualty of War Poster

### **Australian Federal Police**

- Talking Points on – *How many professional standards matters are currently on foot and how will they be catered for through transitional arrangements?*





**APPENDIX 2**  
**WITNESSES WHO APPEARED**  
**BEFORE THE COMMITTEE**

**Sydney, Thursday 27 April 2006**

**Dr A.J. Brown, Senior Lecturer, Griffith Law School & Socio-Legal Research Centre, Griffith University**

**Police Integrity Commission**

Mr Allan Kearney, Director Intelligence and Executive Services

**Police Federation of Australia and Australian Federal Police Association**

Mr Jim Torr, Chief Executive Officer

Mr Ian Phillips, Director Legal

**Commonwealth Ombudsman**

Dr Vivienne Thom, Deputy Ombudsman

Ms Vicki Brown, Senior Assistant Ombudsman

**Attorney-General's Department**

Mr Craig Harris, Assistant Secretary, National Law Enforcement Policy Branch, Criminal Justice Division

Mr Michael Manning, Principal Legal Officer, National Law Enforcement Policy Branch, Criminal Justice Division

**Australian Federal Police**

Commissioner Mick Keelty, Commissioner

Federal Agent Alan Scott, Manager People Strategies

Federal Agent Darren Booy, Project Manager, Fisher Implementation

Mr Peter Whowell, Manager Legislation Program

**Australian Crime Commission**

Mr Alastair Milroy, Chief Executive Officer

Mr Lionel Newman, Director Strategy and Governance