

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

I refer to the request by the Committee for submissions on the *Law Enforcement Integrity Commissioner Bill 2006*.

I am pleased to submit for the consideration of the Committee a copy of a letter by the Police Integrity Commission of NSW presenting its comments on the draft Bill. A copy of that letter was previously provided to the Commonwealth Attorney General's Department on 23 March 2006.

I note that some of the references to clauses in the draft Bill contained in the Commission's letter may be slightly different to those currently in the Bill before Parliament, due to changes to the clause numbers since that letter was written. However, this should not cause significant difficulties because the clauses intended to be referred to in the Bill can be readily identified.

If you have any queries, please do not hesitate to contact Mr Norm Smith of the Ministry on E/N 45265 (smit2nor@police.nsw.gov.au).

I trust that the Commission's comments will be of assistance to your Committee.

Yours sincerely,

Les Tree
Director-General

Our ref: 15287/5

21 March 2006

Mr Les Tree
Director-General
Ministry for Police
Level 13, 201 Elizabeth Street
SYDNEY NSW 2000

Dear Les,

Re: Proposed Law Enforcement Integrity Commissioner Bill 2006

Thank you for inviting comments on the Enforcement Integrity Commissioner Bill 2006.

Whilst the establishment of the proposed Australian Commission for Law Enforcement Integrity (the ACLEI) is a sound step forward for the transparent management of corruption allegations involving federal law enforcement agencies, the Commission's main area of interest lies in the intersection of the functions of the ACLEI with those of the Commission in relation to NSW Police officers.

From the Commission's perspective one of the most important aspects of the ACLEI will be its capacity to share relevant information in a timely manner. In particular, the Commission is concerned about the effectiveness of mechanisms for notification to, or consultation with, the Commission in relation to any ACLEI investigation which might involve NSW police officers, whether seconded to a Commonwealth law enforcement agency or otherwise involved in misconduct by or with staff members of a Commonwealth law enforcement agency ("Commonwealth law enforcement staff members").

In the main, the proposed Bill has made substantial provision for intelligence sharing, cooperative investigative arrangements with State bodies where appropriate, and notifications between relevant agencies. However certain provisions of the Bill might bear some further attention to better advance these objects.

State issues limited to matters involving seconded officers (section 29 and 30)

The Bill requires notification (subject to investigative exigencies) to State agencies only where an allegation of a corruption issue relates to a State officer seconded to a federal law enforcement agency and makes no similar provision for notification where a State officer is otherwise involved in corruption with staff members of such an agency.

In the Commission's view, that takes too narrow an approach to matters in which State bodies such as the Commission might have an interest or be able to engage in a joint investigation.

It might often be the case that significant corrupt conduct within the meaning of the Bill is engaged in by staff members of a Commonwealth law enforcement agency with the assistance or connivance of various other persons, including State police officers, other law enforcement officers or civilians. For example, in this Commission's Operation Alpine/Abelia investigation, the primary officer of interest, a NSW Police officer then seconded to the Australian Crime Commission ("ACC"), engaged in multiple instances of criminal activity in concert with, variously, a NSW Police officer, a seconded ACC officer, criminal informants and civilians.

It would seem to the Commission that if there is to be an obligation on the ACLEI to notify State agencies, in order to provide an opportunity for intelligence sharing and consideration of joint investigations, the obligation should be extended to provide for notification in circumstances involving any State officer who appears to be corruptly involved with staff members of a Commonwealth law enforcement agency or secondees.

Such an obligation would overcome another possible difficulty being the potential for insufficient information sharing leading to the duplication of earlier investigations (sections 6 and 15)

Clearly the ACLEI should have the capacity to investigate conduct which occurred prior to its establishment. However, under the current proposals, the fact that the ACLEI will only provide notification in relation to "seconded officers" may result in the ACLEI not being informed that a matter had been previously examined by State or Territory bodies.

Communication of information obtained (sections 142, 146 and 148)

Where the ACLEI has investigated a matter or received information concerning seconded officers or State police officers acting corruptly with Commonwealth law enforcement staff members, it would also seem appropriate that any investigation report and relevant intelligence be communicated to an interested State agency, unless some positive reason exists to the contrary. The present framework however appears unduly limiting in this respect.

The Bill mandates the disclosure of evidence or information probative of the commission of a State or Territory offence or capable of subjecting a person to civil penalty provisions to the relevant police force or persons capable of initiating such proceedings only. This appears to exclude, or at least limit the capacity of the ACLEI to disseminate information for intelligence purposes at the conclusion of an investigation, and does not appear to permit disclosure to the Commission in any event.

Whilst the ACLEI may elect to disclose information under section 205, that provision appears ill suited to disclosures for intelligence purposes in light of the requirement to afford the affected person an opportunity to be heard. Obviously that requirement would put any affected person upon notice of the possibility of an investigation, undermining any confidential investigation a State agency might consider warranted.

I also note there appears to be no other general “catch-all” provision for dissemination of information where considered appropriate. The Commission’s establishing Act makes express provision for consultation with and dissemination of intelligence and information to investigative agencies and such other persons or bodies as it might think appropriate: s 18(3) *Police Integrity Commission Act 1996*. This provision has proven most useful on various occasions in disseminating information for intelligence and other purposes.

Further, the ACLEI does not appear to have power to disclose information or evidence that might be relevant to managerial or disciplinary action against State officers or other persons at least under the provisions of proposed Part 10 where those persons were neither Commonwealth law enforcement staff members or seconded police officers.

In the Commission’s view, the apparent lack of authority in the ACLEI to disclose at its discretion, information that may be relevant for intelligence or other appropriate purposes to State or Territory police, law enforcement and integrity bodies without recourse to section 205 represents a significant omission in the Bill.

Notification obligations (section 19)

Notwithstanding the position adopted above some thought needs to be given to the form of the proposed unqualified obligation of the Commonwealth law enforcement agencies to notify the ACLEI of relevant matters regardless of the source of the information or intelligence, or the manner in which it might be obtained by such bodies. The obligation attaches whether Commonwealth law enforcement officers become aware of allegations through complaints to that body by a private complainant, or as a result of the sharing of resources in joint investigations, or intelligence communicated by bodies such as the Commission for specified purposes. The Commission would be concerned to ensure that where it discloses information to Commonwealth law enforcement agencies in the latter instances, the obligation to notify the ACLEI does not arise without regard to the views of the Commission as to whether disclosure is appropriate at that point.

In the Commission's view, the obligation to notify needs to be qualified to the extent that issues identified by an originating agency as matters that go to the appropriateness of wider dissemination of the information, need to be taken into account. It is highly likely that there will be occasions when an originating agency has concerns that further disclosure to the ACLEI (or elsewhere) might in some manner be capable of prejudicing an ongoing investigation or the safety of individuals.

One minor matter which might require attention is the obligation of the Commissioner of the Australian Federal Police in relation to matters coming to notice by way of copies of warrants under the *Telecommunications (Interception) Act 1979*. As you will be aware, the AFP is provided with copies of warrants obtained by other agencies for the interception of telecommunications. Such warrants contain the names of persons of interest and short particulars of suspected offences. It may well be that where the named person is a Commonwealth law enforcement officer or at least an AFP officer, the AFP Commissioner might be obliged to notify the ACLEI. This Commission would consider it inappropriate to require notification in circumstances where such information is passed to the AFP for the purposes of what is effectively the exercise of an administrative function.

Power to require information (sections 76 and 80)

The Commission believes that the power of the ACLEI to require information or the production of documents should be expressly limited in relation to officers of this Commission, as is the case for staff members of defined law enforcement agencies.

The disclosure of information and documents held by the Commission is governed by rigorous secrecy provisions under its establishing Act, and it would be a matter of significant concern to the Commission were the ACLEI able to impose such a requirement in the face of the secrecy obligations of the Commission, as appears able to be done by virtue of proposed section 80(5).

No doubt it would be rare, if ever, that the ACLEI might contemplate proceeding in this manner to obtain information from the Commission. Nonetheless the Commission is concerned to foreclose the possibility that such coercive means might be used in preference to any anticipated cooperative arrangements.

Other aspects of the legislation

Capacity of the ACLEI to proactively develop targets (section 15).

In carrying out its brief to deal with police misconduct, an important tool of the Commission has been its capacity to identify potential areas of corruption by way of the development of intelligence and active detection processes. In such circumstances, the Commission necessarily proceeds, at least initially, with no specified allegation of police misconduct or the involvement of any particular officers.

It is not clear whether the ACLEI might proceed in a similar manner in so far as its functions do not expressly include the identification or detection of corruption or misconduct. Whilst the ACLEI may deal with corruption issues on its own initiative, the relevant provisions may be less than sufficient to enable it to take the investigative steps outlined above.

Dealing with contempt (section 94)

I note it is proposed that various contempts of the ACLEI be dealt with as an offence, presumably in accordance with its general procedures for the referral of matters for consideration and prosecution by the Commonwealth Director of Public Prosecutions.

In so far as the provisions for contempt of the ACLEI is intended to provide the Commission with effective authority in a hearing situation, that process may be of limited use. It would be unlikely that matters dealt with by referral would be resolved quickly enough to enable the ACLEI to compel relevant evidence from a recalcitrant witnesses in time to assist in its investigation.

Yours sincerely,

T P Griffin
Commissioner