

Committee Secretary

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (ACLEI)

PO Box 6100

Parliament House

CANBERRA

Submission: Inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006*

Introduction

This submission is based on the following:

1. Advocacy for the delivery of an improved national approach to anti-corruption (afforded with the current review of ACLEI).
2. The requirement for the Federal Government to fully comply with the United Nations Convention Against Corruption (specifically Articles 6 on Preventative Anti-Corruption Body or Bodies and Article 36 on Specialised Authorities).
3. Recognition that the scope and mandate of ACLEI is too restrictive, it does not properly address issues of corruption across government.
4. The absence of a national public and non-public sector approach to anti-corruption and does not recognise the predatory governance environment and potential of corruption across government and industry in the national and international sectors (and the increasing dependency of each).

This submission is based on the precept that the current measures applied by ACLEI, and required by instruments such as the United Nations Convention for Anti-Corruption, are important to Australia's integrity framework and the national capacity to prevent, detect and respond to corruption.

Key Anti-Corruption Issues

Governments and agencies traditionally struggle with the preventative, detection and response measures associated with corruption. It is poorly understood, ill-defined and largely shaped by selective predicate offences

which are applied across a wide range of different legislation and agency roles and responsibilities.

There is significant rhetoric and an inability to distinguish between levels of corruption that are nationally significant and those involving minor 'street level' corruption. Consequently, police and anti-corruption agencies too often target the 'low hanging fruit' through the use of poorly understood investigative case selection methodologies and limited risk management methodologies which results in an inability to appropriately define corruption the higher priority corruption targets (and risks). In the absence of good process and systems of control, claims of investigation and prosecution outcomes are then incorrectly used to reflect reform and progress in national corruption.

The general concept of the 'zero tolerance' of anti-corruption remains only an aspirational goal and is unachievable – so if this were the first key performance indicator – the Federal Government would be marked as having failed. As corruption is normally described by the predicate offences such as fraud, collusion, bribery etc... (referred to as enabling activities), there is merit in breaking this down further to gauge the potential effectiveness of Government's approach to corruption. For example, using fraud (noting that not all fraud is associated with corruption) as an enabling activity for corruption, we note from the AFP and ACC that detection rates for fraud are approximately 3-5 percent and prosecution rates even lower. This then means that over ninety percent of fraud remains unreported, undetected and/or is not prosecuted.

Agencies rely on a wide range of preventative measures to identify corruption (and enabling activities such as fraud), and key to this are facilitation activities such as audit and whistle blower programs. Yet findings in 2005 from the ACC and AFP suggest that only five percent of audits successfully contribute to the detection of fraud and corruption, which means that there are potentially lots of people involved in corruption activities who remain unreported, undetected and outside the view of their work colleagues and the systems of control. This is even further exacerbated when considered in the context of issues such as spent and pending convictions, further suggesting that there is a likelihood that many of the cases in the public sector (and non-public sector) have not

yet been detected and/or were not able to be prosecuted (it was also noted by the ACC that that in 30-40 percent of the cases fraudulent and corrupt financial activity was detected through third parties, such as clients, and internally by the organisation – which suggests there is significant merit in an effective national whistle blower program and yet as another key UNCAC requirement, Australia still does not have a national whistle blower system).

Claims by the APSC in the Commissioner's State of the Service Report 2011 (see Section 3 Values, Performance and Conduct, pp68-73) fail to adequately reflect actual levels of corruption in enabling activities, such as fraud (other than through statements of achievement based on reporting, investigation and the prosecution levels of fraud). **This is not to suggest any deliberate action on the part of Government or the Commission**, but more to advocate for the strengthened capacity across government and in establishing a specialist anti-corruption agency to effectively prevent, detect and respond to corruption enabling and facilitation activities (eg fraud, collusion, bribery etc...). This also clearly suggests that despite our perceptions, there is much that we don't know about corruption, particularly if we are not even looking (and noting the difference in reported and detected rates of corruption facilitation activities suggesting that for every case reported there are potentially 20 unreported).

Given the low rates of reporting through whistle blower programs and even using the rates of investigation as an indicator of levels of corruption, the current rates of investigation are not good indicators or tools through which to calibrate trends and patterns in corruption activities (particularly if it would appear we are not even detecting or having reported the majority of corruption cases). Hence the value attributed to much of the claims of integrity and low levels of corruption, particularly across many of the public sector, are at best questionable.

ACLEI – Resourcing and Capability Issues

The restrictive scope of ACLEI's role, particularly in relation to the focus on agencies only involved in law enforcement, is at odds with the broader compliance requirements of UNCAC and the measures needed to prevent,

detect and respond to corruption. Indeed, the agencies covered by ACLEI already maintain investigative and self governing capabilities and most of the investigations referred to ACLEI are then referred back to the reporting agency. Indeed, most of the investigations reported and investigated by ACLEI would not meet the threshold applied to serious and/or organized corruption activities – which is what is expected of a national anti-corruption agency (albeit ACLEI is currently restricted in its role to meet these requirements).

There is a strong imperative and national interest to include additional agencies in the areas of responsibility for ACLEI and/or in extending and enhancing the capacity of the Commission to the Whole of Government. Importantly, this must also of course be reflected in funding, staffing, training, capability etc.... Yet the current ToR does not go far enough, and agencies such as AusAID, which operates across many international predatory governance environments in the aid sector in very high value programs, remains largely invisible in corruption reporting with no effective internal anti-corruption and due diligence of key programs. Consistently being told that there is no problem by public servants without the appropriate training and skills that there is no corruption is not sufficient. Similarly, work place relations portfolios covering the Department of Education, Employment and Workplace Relations (DEEWR), particularly in areas such as indigenous and training and grant programs, are also not included – yet are responsible for major financial projects being delivered in difficult and remote governance situations with few (if any) effective anti-corruption measures. The intention is not to criticize any public sector agency, but to highlight the need for greater scrutiny and deliberateness in our approach to dealing with corruption.

Importantly this submission is not simply advocating for ACLEI to only have responsibility for public sector agencies, but as a national body to also include significantly enhanced capabilities to also include industry. The distinction between the public and non-public sectors is less distinguishable than ever before and key dependencies by government on major contracts and commercial agreements, further affirms the need to approach corruption as a

national strategy (also reflected in the Attorney General's National Anti-Corruption Strategy currently being developed).

Establishing a National Approach to Anti-Corruption – ACLEI?

ACLEI would require significant funding, resourcing and improvements in its capacity if the responsibility for the agencies identified in the ToR or the wider public sector were to be included. As importantly, and given the requirement for a nationalised single agency (or agencies) approach to managing anti-corruption, to what extent the jurisdiction of the anti-corruption body (ACLEI) should be mandatory is also critical. Indeed, experience from other countries suggests that mandatory jurisdiction will result in overburdening the institution with cases (eg having it deal with street level corruption rather than serious and high levels of corruption). That is, there should be consideration on key issues of retrospectivity of cases as well as in limiting the jurisdiction of the services to important and high-level corruption cases. This should include much better skills and training in corruption risk management (you cannot be everywhere, all the time, on everything!), intelligence and in education, awareness and training programs (so a much greater emphasis on reporting, response and education programs).

The specific requirements of a national anti-corruption agency are extensive, and there are a number of models nationally and internationally which have a range of different functions, roles and services, but there is no set model of best practice and some of the successful models are not entirely investigative. The following list is not to suggest that ACLEI need have capacity in all of the following, but it does list a range of tasks that contribute toward building a national anti-corruption capability, that should be considered to include:

- **Policy development, research, monitoring and coordination:**
 - Functions encompass research of trends, levels of corruption and assessment of effectiveness.
 - Include policy development, coordination, action plans and monitoring and coordination of implementation measures
 - Focal point for international cooperation
- **Prevention of corruption in power structures:**

- Focus at promoting ethics inside public institutions and include implementation of special measures.
- Include prevention of conflict of interest, assets declaration and public access to declarations
- Prevent corruption through anti-money laundering measures, controls on procurement and other preventive functions for transparency in the public service
- **Education and awareness raising:**
 - Developing and implementing educational programs for the public and civil servants,
 - Media campaigns and awareness raising activities for business and government
- **Investigation and prosecution:**
 - Ensure a legal framework for effective prosecution of corruption, including sanctions for all forms of corruption
 - Include overseeing interagency cooperation and the exchange of information on specific cases
 - Include acting as a focal point for mutual legal assistance and extradition requests
 - Maintaining, analyse and report law enforcement statistics on corruption related offences.

Measuring Performance and Outcomes

The key issue is never the number or the type of investigations, but the impact ACLEI can potentially have in better shaping and informing national integrity standards, systems and expectations across the Whole of Government and in the public. Simply referencing investigations, many of which are then referred back to the actual originating agency, or are shared with the agency, fails to calibrate the actual scope and systemic nature of the level of corruption and only provides for the appearance of outcomes.

In building the capacity of ACLEI, it must maintain adequate accountability through set performance standards that are not simply based on punitive outcomes and/or numbers of investigations. For example, the Hong Kong ICAC is accountable to four independent advisory groups, and the

performance standards set timings for reporting, response, prevention and education outputs in anti-corruption. Relatively little of the performance standards are established around numbers of investigations (yet this is a key basis ACLEI is using in reporting to establish compliance and performance in anti-corruption).

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Background of the Author

Dr Ken Norman is the Managing Director of Pario Solutions Group and is currently leading the delivery of a three year program of work by the Federal Government through AusAID, of the Vietnam Communist Party Anti-Corruption Program. The Program is focused on the development of senior members of the State and Party in anti-corruption including programs in whistle blower protection, integrity systems, and anti-corruption investigations. Ken also leads programs with the Australian Federal Police in law and policing reviews and has just completed leading a team in the base lining of the Pacific Police Development Program across six countries. Ken has a PhD in risk management systems and was previously in the Federal Government in roles in the Department of Defence and Australian Crime Commission. He has delivered a wide range of international projects and has served in operations in Afghanistan and in international roles in Iraq.