

LAW ENFORCEMENT INTEGRITY COMMISSIONER AMENDMENT (OFFICE OF THE SPECIAL INVESTIGATOR AND OTHER MEASURES) REGULATIONS 2021

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Law Enforcement Integrity Commissioner Act 2006* (Cth) (**Act**) establishes the office of the Integrity Commissioner. The Integrity Commissioner's functions include detecting, determining and investigating corruption issues in law enforcement agencies within their jurisdiction. The Act also establishes the Australian Commission for Law Enforcement Integrity (**ACLEI**) to assist the Integrity Commissioner in the performance of their functions.

Section 224 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Law Enforcement Integrity Commissioner Amendment (Office of the Special Investigator and Other Measures) Regulations 2021* (Cth) (**Regulations**) will enable the Integrity Commissioner to exercise their functions over the Office of the Special Investigator (**OSI**) by expanding ACLEI's jurisdiction.

The Regulations will also introduce a sunset period which will apply to provisions relating to prescribed law enforcement agencies added to ACLEI's jurisdiction via regulation.

The Regulations will do this by:

- prescribing the OSI as a 'law enforcement agency' for the purposes of the Act
- specifying the persons who will be prescribed as staff members of the OSI and secondees to the OSI
- specifying the person who will be prescribed as the head of the OSI, and
- specifying that the provisions relating to ACLEI's expanded jurisdiction (sections 5A, 6A and 7A of the *Law Enforcement Integrity Commissioner Regulations 2017* (Cth) (**Principal Regulations**)) will sunset at the start of 1 October 2024.

Paragraph (d) of the definition of **law enforcement agency** in subsection 5(1) of the Act provides that regulations may prescribe a Commonwealth government agency as a law enforcement agency under the Act, where the agency has a law enforcement function.

Subsection 10(4) and paragraph 10(5)(d) of the Act provide that **staff members** and **secondees** of law enforcement agencies may also be prescribed by regulation.

Paragraph (c) of the definition of **head of a government agency** in section 5(1) of the Act provides that regulations may prescribe that a specific person holding the office in a

Commonwealth government agency as the ‘head’ of a ‘law enforcement agency’ for the purpose of the Act.

The Office of the Special Investigator

The Office of the Special Investigator (OSI) commenced on 4 January 2021 as an Executive Agency by an Executive Order made on 10 December 2020. The OSI is working with the Australian Federal Police (AFP) to investigate allegations of criminal offences under Australian law arising from or related to any breaches of the laws of armed conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016.

The OSI is also prescribed in Schedule 1 of the Public Governance, Performance and Accountability Rule 2014 as a listed entity for the purpose of the *Public Governance, Performance and Accountability Act 2013*.

Given the nature of the investigations the OSI will be working on with the AFP and the highly sensitive information the OSI will have access to, it is important that appropriate oversight arrangements are in place. Expanding ACLEI’s jurisdiction to include the OSI will help to ensure that OSI staff maintain the highest levels of integrity and professionalism, and that the Australian public have confidence in this fact.

The OSI consists of approximately 30 staff, not including an additional approximately 50 investigators and intelligence analysts who are AFP appointees deployed to the joint AFP-OSI investigation. As AFP appointees, those investigators and intelligence analysts are already subject to ACLEI’s jurisdiction. The exact number of OSI staff subject to ACLEI’s jurisdiction will vary.

Consistent with section 6(2) of the Act, to fall within ACLEI’s jurisdiction a staff member of the OSI would need to have engaged in corrupt conduct which relates to a law enforcement function of the OSI. This provision ensures ACLEI’s jurisdiction over prescribed law enforcement agencies is clearly linked to the law enforcement functions of agencies.

The Australian Government has decided to expand ACLEI’s jurisdiction to include OSI, via amendments to the Principal Regulations. This expansion is a temporary measure and will ensure appropriate oversight arrangements are in place until the Commonwealth Integrity Commission (CIC) commences.

The CIC will be a centralised, specialist centre investigating corruption in the public sector. It will be established as an independent statutory agency, subsuming ACLEI and its jurisdiction via legislation.

Timing for the passage of the CIC Bills will be subject to parliamentary processes. The Government intends for the CIC to commence operations six months after the date of Royal Assent.

Sunsetting provisions

In response to a recommendation from the Senate Standing Committee for the Scrutiny of Delegated Legislation, the Regulations will also introduce a sunset period for provisions

relating to prescribed law enforcement agencies, including the OSI. These provisions will be repealed at the start of 1 October 2024.

This sunset period will provide an appropriate transitory timeframe given the Government's intention that the CIC will subsume ACLEI.

Details of the Regulations are set out in [Attachment A](#).

CONSULTATION

The OSI, ACLEI and the Department of Home Affairs were consulted on the development of the Regulations.

REGULATION IMPACT STATEMENT

The Regulations are not likely to impact on business or restrict competition (OBPR: 44466).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

1. The Regulations will amend the Principal Regulations to expand the jurisdiction of the Integrity Commissioner to oversee the OSI. This will provide the Integrity Commissioner (the head of ACLEI) with the jurisdiction to detect, determine and investigate corruption issues within the OSI. The Regulations specify the persons who are the staff members of the OSI for the purpose of subsection 10(4) of the Act, which includes Director-General of the OSI, the Special Investigator of the OSI, secondees, and contractors.
2. The Regulations will also amend the Principal Regulations to include a sunset period for prescribed law enforcement agencies added to ACLEI's jurisdiction via regulation.
3. The main purpose of the Regulations is to ensure appropriate oversight arrangements by the Integrity Commissioner are in place for the OSI. This will ensure that OSI staff maintain the highest levels of integrity and professionalism, and that the Australian public have confidence in this fact.
4. The **Act** establishes the office of the Integrity Commissioner, and the ACLEI.
5. Paragraph (d) of the definition of **law enforcement agency** in subsection 5(1) of the Act provides that regulations may prescribe a Commonwealth government agency as a law enforcement agency under the Act, where the agency has a law enforcement function. Subsection 10(4) and paragraph 10(5)(d) of the Act provide that **staff members** and **secondees** of law enforcement agencies may also be prescribed by regulation.

Paragraph (c) of the definition of *head of a government agency* in section 5(1) of the Act provides that regulations may prescribe that a specific person holding the office in a Commonwealth government agency as the ‘head’ of a ‘law enforcement agency’ for the purpose of the Act.

Human rights implications

Right to privacy

6. Article 17 of the International Covenant on Civil and Political Rights provides the right to freedom from unlawful or arbitrary interference with a person’s right to privacy. The right to privacy may be limited in pursuit of a legitimate objective, and where the limitation is authorised by law and is not arbitrary. Any limitation should be reasonable, necessary and proportionate to the objectives of the limitation.
7. The Regulations engage the right to privacy as the Act specifies that the Integrity Commissioner may share information or documents with government agencies if it is relevant to the investigation of a corruption issue (section 70 of the Act) and requires staff members of the OSI, or other persons with information that is relevant to corruption issues in the OSI, to provide information to ACLEI or answer questions (sections 75-77 of the Act).
8. This limitation is not unlawful or arbitrary as the intention of the Regulations and the provisions in the Act is to ensure the Integrity Commissioner can investigate potential corruption issues in the OSI. The Act includes limitations on the disclosure and use of personal information.
9. For example, the Integrity Commissioner is prohibited from disclosing information or documents that could be contrary to the public interest if such a disclosure would result in prejudicial consequences (section 54(6) of the Act). Further, disclosure is generally only permitted for the purpose of investigating a corruption issue or other purposes connected with the exercise of the Integrity Commissioner’s functions.
10. There are also limitations in the use of self-incriminatory evidence obtained at a hearing. Self-incriminatory evidence is not admissible in evidence against the person in criminal proceedings except for a small number of criminal offences, including providing false and misleading information, obstructing a Commonwealth official, or a disciplinary proceeding against the person if the person is a staff member of a law enforcement agency (section 80 of the Act).
11. In these circumstances, although the right to privacy is limited by these Regulations, it is appropriate and reasonable in the circumstances and there are sufficient protections to limit information from inappropriate use or disclosure.

Existing safeguards and accountability mechanisms for ACLEI

12. The Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity reports to both Houses of Parliament on matters relating to ACLEI. The Committee monitors and reviews the performance of the Integrity Commissioner’s

functions, and examines each annual report and any special reports produced by the Integrity Commissioner.

13. The LEIC Act makes provisions for dealing with issues that relate to the conduct of the Integrity Commissioner and current or former ACLEI staff members. Any person may raise a concern with the Integrity Commissioner about the conduct of ACLEI staff and the Integrity Commissioner has an obligation to notify the Minister of any corruption issue concerning an ACLEI staff member. The Minister can arrange for ACLEI corruption issues to be investigated independently by a Special Investigator, using the same investigative powers that are available to the Integrity Commissioner.
14. A person dissatisfied with ACLEI can complain to the Integrity Commissioner. Should the matter remain unresolved, the person may refer the complaint to the Commonwealth Ombudsman who will decide how the matter will be handled.
15. ACLEI's use of certain intrusive or covert powers is also subject to the inspection and monitoring of the Commonwealth Ombudsman. Inspections are made at least annually, and the Ombudsman may also inspect ACLEI's records at any time. The Ombudsman is required to report annually to the Parliament on the comprehensiveness and adequacy of ACLEI's records relating to the use of these powers.

Conclusion

The Regulations are compatible with human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 - Name of Regulations

This section will provide that the title of the Regulations is the *Law Enforcement Integrity Commissioner Amendment (Office of the Special Investigator and Other Measures) Regulations 2021 (Regulations)*.

Section 2 - Commencement

This section will provide for the Regulations to commence on the day after the instrument is registered.

Section 3 - Authority

This section will provide that the Regulations will be made under the *Law Enforcement Integrity Commissioner Act 2006 (Cth) (Act)*.

Section 4 - Schedule(s)

This section will enable each instrument that is specified in a Schedule to this instrument to be taken as amended or repealed as set out in the Schedule, and will specify that any other item in a Schedule has effect according to its terms.

SCHEDULE 1 – Amendments

This schedule contains amendments to the *Law Enforcement Integrity Commissioner Regulations 2017 (Cth) (Principal Regulations)*.

Item [1] – Section 5

Item 1 will insert a definition of the *Office of the Special Investigator (OSI)* in section 5 of the Principal Regulations. This item will specify that the OSI means the Office of the Special Investigator, established as an Executive Agency under section 65 of the *Public Service Act 1999*.

Item [2] – Section 5A

Item 2 will insert a numbered section into section 5A of the Principal Regulations to clarify the operation of the section as Item 4 inserts a new subsection.

The reference to ‘for’ will be omitted and substituted for ‘(1) For’.

Item [3] – Section 5A (at the end of the table)

Item 3 will amend the table in section 5A of the Principal Regulations to prescribe the head of the OSI.

The first column of the table will prescribe that the OSI is a ‘Commonwealth government agency’ for the purposes of paragraph (d) of the definition of *law enforcement agency* in subsection 5(1) of the Act.

The second column of the table will specify the ‘*Director-General of the Office of the Special Investigator*’ as the head of the OSI for the purpose of paragraph (c) of the definition of *head of a government agency* in subsection 5(1) of the Act.

The Act confers specific duties on a *head of a government agency*. For example, under section 19 of the Act, if the *head of a government agency* becomes aware of an allegation or information, that raises a corruption issue that relates to the agency, the *head of the government agency* must notify the Integrity Commissioner in writing of the corruption issue.

This mandatory obligation will not extend to corrupt conduct of which the Director-General of the OSI became aware before the commencement of the proposed Regulations. However, under section 23 of the Act, the Director-General of the OSI would have the discretion to refer matters to the Integrity Commissioner that they became aware of prior to the commencement of the proposed Regulations.

Prescribing a person as a *head of a government agency* also imposes obligations on the Integrity Commissioner. For example, under section 52 of the Act, the Integrity Commissioner must take reasonable steps to keep the head of a government agency informed of the progress of an investigation, where the corruption issue relates to the government agency.

Item [4] – At the end of section 5A

Item 4 will amend section 5A of the Principal Regulations to include a sunset period that applies for that section. This Item will specify that section 5A is repealed at the start of 1 October 2024.

Item [5] – Section 6A

Item 5 will insert a numbered section into section 5A of the Principal Regulations to clarify the operation of the section as Item 6 inserts a new subsection.

The reference to ‘for’ will be omitted and substituted for ‘(1) For’.

Item [6] – At the end of section 6A

Item 6 will amend section 6A of the Principal Regulations to prescribe the OSI as a law enforcement agency for the purposes of paragraph (d) of the definition of *law enforcement agency* in subsection 5(1) of the Act.

This will allow the Integrity Commissioner to exercise their functions, for example, by detecting and investigating corruption issues related to the OSI (see paragraphs 15(aa) and 15(a) of the Act). The Integrity Commissioner can only exercise its functions over staff members engaging in corrupt conduct, where the conduct relates to the performance of a law enforcement function of the OSI (see paragraph 6(2) of the Act).

Item 6 will also amend section 6A of the Principal Regulations to include a sunset period that applies for that section. This Item will specify that section 6A is repealed at the start of 1 October 2024.

Item [7] – Section 7A(3) (at the end of the table)

Item 7 will amend the table in section 7A of the Principal Regulations to prescribe the persons who will be considered staff members of the OSI and secondees to the OSI, for the purposes of the Act.

Column 1 of the table will specify the OSI as the Commonwealth government agency to which section 7A applies to.

Column 2 will specify the following persons or groups of persons as the staff members of the OSI for the purpose of 10(4) of the Act:

- the Director-General of the OSI
- the Special Investigator for the OSI
- the Director of Investigations for the OSI
- persons engaged under the *Public Service Act 1999* to assist in the performance of the OSI's functions
- persons seconded to the OSI under s 40F of the *Australian Federal Police Act 1979 (AFP Act)*
- persons whose services are made available to the OSI, by or on behalf of the following, other than the AFP, to assist in the performance of the OSI's functions (whether located within or outside Australia):
 - a Commonwealth entity (as defined in section 10 of the *Public Governance, Performance and Accountability Act 2014 (PGPA Act)*);
 - government agencies (as defined in section 5 of the Act); and
- persons engaged as consultants or contractors to assist in the performance of the OSI's functions.

By prescribing these persons as staff members, the Integrity Commissioner will be able to investigate any potential corruption allegation involving a person assisting, or providing services to, the OSI. This Item takes a deliberately broad approach to defining a staff member and secondees, to ensure that there are no gaps in ACLEI's jurisdiction over the OSI.

The AFP and OSI will jointly investigate relevant alleged offences involving Australian Defence Force personnel in Afghanistan from 2005 to 2016. The AFP will deploy AFP appointees (see definition of AFP appointees in section 4 of the AFP Act) to the joint investigation to work with the OSI to investigate the commission of these alleged offences. These AFP appointees will exercise the statutory powers and functions conferred on them in their capacity as AFP appointees and would be subject to the command and control of the Commissioner of the AFP.

The AFP appointees are not staff members of the OSI, with the exception of persons seconded to OSI under section 40F of the AFP Act. AFP appointees, who are deployed to the joint investigation and working with the OSI, are already included in the Integrity Commissioner's jurisdiction under section 10(1) of the Act.

Column 3 will prescribe the following persons as the secondees of the OSI for the purpose of subsection 10(5)(d) of the Act:

- persons seconded to the OSI under s 40F of the AFP Act
- persons whose services are made available to the OSI, by or on behalf of:
 - a Commonwealth entity (as defined in section 10 of the PGPA Act), or
 - government agencies (as defined in section 5 of the Act).

It is important to explicitly identify staff members of the OSI who also constitute secondees to the OSI. This ensures that a potential corruption issue involving a secondee enlivens the secondee-specific provisions in the Act. For example, under section 29(2)(a) of the Act, if a corruption issue relates to a secondee to a law enforcement agency who is also an employee of another government agency, the Integrity Commissioner must inform the head of the secondees' home agency of the corruption issue.

Item [8] – At the end of section 7A

Item 8 will amend section 7A to introduce a sunset period that applies for that section. This Item will specify that section 7A is repealed at the start of 1 October 2024.