

CHAPTER 3

SHOULD THE COMMONWEALTH ADOPT INTEGRITY TESTING?

Committee's previous findings in relation to integrity testing

3.1 The committee has previously considered the merit of introducing integrity testing in the course of its inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act).¹

3.2 In the interim report for that inquiry, tabled in February 2010, the committee noted that a careful balance must be achieved between better enabling law enforcement agencies to deter and detect corruption through the introduction of an integrity testing program, and the need to remain alert to the ethical challenges of entrapment. The committee further noted the costly and time-consuming nature of integrity testing. These issues are further considered in this chapter.

3.3 The committee supported, in principle, the introduction of an integrity testing program within the Australian Federal Police (AFP). On the evidence then before it, the committee considered that such a regime should be targeted or intelligence-based and not random. Further, the committee considered it critical that ACLEI be assigned responsibility for monitoring such a regime, with a view to maintaining the balance of priorities outlined above.

3.4 The committee also noted that, in addition to the AFP, there may be merit in introducing an integrity testing regime across a 'broader range of agencies with law enforcement functions'. The committee observed that, on the surface, it made sense to extend such a measure to other agencies with a similar corruption risk profile to that of the AFP. On this basis the committee suggested that this issue be further explored, including an expanded role for ACLEI in such a regime.

3.5 Accordingly, the committee recommended that the Australian Commission for Law Enforcement Integrity be assigned responsibility for the monitoring of an integrity testing regime, should one be introduced, and that the LEIC Act be amended to include this function accordingly.

3.6 In this chapter and chapter 4, the committee considers these and other issues, including a possible model for integrity testing within certain Commonwealth agencies.

1 For a full account of the committee's findings relating to integrity testing in that inquiry, see *Inquiry into the operation of the Law Enforcement Integrity Commissioner Act 2006*, Interim Report, February 2010.

Support for integrity testing

3.7 Of the eleven submissions received in the course of the inquiry, a number supported the introduction of integrity testing within certain Commonwealth law enforcement agencies, including ACLEI, the AFP and the Australian Crime Commission (ACC).

3.8 In its evidence to the committee, ACLEI stated its support for the introduction of an integrity testing capability within the LEIC Act, submitting:

While there is no 'corruption crisis' in Commonwealth law enforcement, the emergence of targeting of government officials by organised crime groups in some jurisdictions means that integrity testing now warrants close consideration by agencies that may be vulnerable to such attacks.²

3.9 Elaborating on this comment, Mr Philip Moss, Integrity Commissioner, stated:

I have spoken with this committee in recent years and in my annual reports about the aggressive tactics used by organised criminal groups to achieve their aims. The risk of infiltration and corrupt compromise in agencies engaged in the fight against organised crime continues to engage ACLEI. I have spoken also about the problems of the conscious opponent and the invisibility of corruption. These phenomena make it difficult to detect and gather evidence about corrupt conduct in a law enforcement environment, and we should not underestimate the challenge involved. Accordingly, I believe it would be timely now to add integrity testing to the options available to combat corruption. It will not be a panacea and it will not be the right method for every agency or in every instance; however, for the right situations, it will be useful to have the ability to conduct integrity testing.³

3.10 In particular, ACLEI sees value in integrity testing being used as an investigation tool. ACLEI informed the committee that the method overcomes evidence collection problems that can otherwise face anti-corruption investigators, namely:

- the familiarity of a subject with sophisticated methods to conceal his or her own subterfuge;
- conspiracy between individuals to obstruct investigations; and
- collecting direct, contemporary evidence about conduct that does not rely on:
 - inference;
 - uncorroborated information (the 'disreputable witness' and 'self-interested co-conspirator' problems);

2 ACLEI, *Submission 4*, p. 5.

3 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 2.

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- information only about past events (the 'one step behind' problem); or
 - testimony of witnesses or whistle-blowers who would otherwise be exposed and placed in jeopardy.⁴

3.11 The AFP recognised the deterrent effect of integrity testing, and was of the view that the introduction of an integrity testing regime would further strengthen the AFP's toolkit in combating corruption. However, it noted that integrity testing should not be pursued to the detriment of other capabilities such as education and training, early detection, a strong leadership culture, and effective guidance to assist AFP appointees to make ethical decisions.⁵

3.12 The ACC also supported targeted integrity testing of its officers on the basis that it would further strengthen the ACC's existing integrity framework. The ACC indicated its support for several models, including integrity testing conducted by ACLEI, by itself (in consultation with ACLEI), jointly with ACLEI or by another agency authorised by ACLEI.⁶

3.13 In addition, CrimTrac, noting the committee's recommendation in a previous inquiry to include CrimTrac in a second-tier ACLEI jurisdiction, informed the committee that it would have no objection to being subject to an integrity testing regime.⁷

3.14 The Australian Federal Police Association (AFPA) and the Police Federation of Australia (PFA), however, were generally opposed to the introduction of integrity testing, particularly on a random basis, at the Commonwealth level.⁸ AFPA opposed the introduction of integrity testing within the AFP for reasons canvassed in the issues section below, while the PFA raised concerns about the potential effects of a Commonwealth integrity testing regime on seconded state and territory police officers.⁹

3.15 In addition to the views described above, a number of other organisations provided evidence elaborating on various issues relating to integrity testing. This evidence is presented below.

4 ACLEI, *Submission 4*, p. 6.

5 AFP, *Submission 10*, p. 6.

6 ACC, *Submission 11*, p. 3.

7 CrimTrac, *Submission 8*, p. 1.

8 AFPA, *Submission 6*, p. 1.

9 PFA, *Submission 7*, p. 1.

Issues raised

3.16 In evidence provided to the committee, a number of issues associated with integrity testing were raised, including cost, impact on morale, legal issues such as inducement, and the effectiveness of integrity testing as an integrity measure.

Cost

3.17 ACLEI, the AFP, and the Attorney-General's Department (AGD) all noted that integrity testing is a resource intensive exercise.¹⁰ Because integrity testing requires the creation of detailed, highly realistic scenarios that are tailored to the circumstances of each particular case, preparing a test can be a costly proposition. In addition, specialist teams may be required to assist with the execution of a test, including undercover operatives, often seconded from other agencies, and surveillance or telecommunication intercept capabilities.

3.18 The AFP informed the committee that the costs for an agency conducting an integrity testing regime would vary depending, for example, on whether the regime was fully internal or fully outsourced. A fully internal, dedicated integrity testing unit within the AFP was estimated to cost \$8 million, while other options included contracting another agency on a user-pays basis, or a hybrid of the two models.¹¹

3.19 The Western Australian Police, however, noted that their own integrity testing program was no longer run by a stand alone unit, but was instead conducted by a broader unit with covert operations specialisation. As Detective Superintendent Tony Flack explained:

If I simply had officers sitting there trying to drum-up integrity tests, I do not think I would be getting value for money. But inside a covert services/covert investigations cell, where all the investigators are trained in looking for integrity tests, there are opportunities to be very cost effective in using existing investigation resources than trying to run integrity tests.¹²

3.20 ACLEI emphasised its preferred approach to integrity testing was the introduction of a 'low-level, low-cost' option. The Integrity Commissioner explained:

[W]hat I would be hoping for if a decision was made to proceed with integrity testing, would be a very low level, low-cost approach to integrity testing, and it being added in that sense of another option rather than the more expensive possibility of integrity testing units and all the expense and issues that go with that.¹³

10 ACLEI, *Submission 4*, p. 6; Assistant Commissioner Leanne Close, AFP, *Committee Hansard*, 19 August 2011, p. 16; AGD *Submission 5*, p. 1.

11 AFP, *Submission 10*, p. 5.

12 Detective Superintendent Tony Flack, Western Australia Police, *Committee Hansard*, 9 September 2011, p. 10.

13 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 3.

3.21 The committee notes that the cost of integrity testing is one reason why many police forces choose to conduct targeted rather than random testing, as it is considered that targeted tests provide greater value for money.

Negative effects on morale and capacity to act.

3.22 The effect of integrity testing on the morale, and capacity to act, of officers within an agency was raised as a concern, particularly in relation to a random testing program.

3.23 In ACLEI's view, any approval of the notion of integrity testing would need to balance the positive anti-corruption benefits against the possible unintended negative effects, including erosion of:

- the trust-relationship between an employee and their employer; and
- the preparedness of public officials to act with confidence, especially in a law enforcement environment in which fast judgements are required and officers have a large degree of discretion in the performance of their duties.¹⁴

3.24 Similarly, AFPA expressed concern that integrity testing would have a net negative effect as a result of reduced trust between officers and lower staff morale. AFPA noted that this could undermine the operation of a professional and ethical workplace, while impeding efficiency as police constantly 'look over their shoulders'.¹⁵ Mr Jim Torr, AFPA, elaborated on this issue, observing:

Policing requires trust. The AFP has one of its core values as trust. In the environment out there, the hostile, quick moving environment, trust is everything. You do not really have a lot of time to second guess everything that comes your way before you start making decisions. In an intangible and philosophical sense: how do you reconcile an organisation and a profession that runs on trust where you have established a pretty big structure that says, 'We do not trust you and we are going to test you at every turn because we do not trust you'? It is another side to the issue.¹⁶

3.25 The AFPA referred the committee to comments by the former AFP Commissioner, Mr Mick Palmer AO APM, who argued that integrity testing would:

...incur the rancour and indignation of the rank and file and it could be argued that the divisiveness and acute circumspection they create militates against a unified agency and destroys positive as well as negative aspects of the police subculture.¹⁷

14 ACLEI, *Submission 4*, p. 6.

15 AFPA, *Submission 6*, p. 2.

16 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, p. 49.

17 Detective Senior Constable Stephen Newton, 'Integrity Testing as an Anti-Corruption Strategy', *Australian Police Journal*, December 1997, p. 224.

3.26 Western Australia Police also provided comment on the issue of staff morale, observing that day to day morale was not necessarily the same as agency *esprit de corp*. As Detective Superintendent Flack remarked:

My view from 31 years experience is that police officers would get over it if it were to become random. Yes, in the initial view they would beat the drum and say, 'I don't like it; it's an infringement; you don't trust us,' and the rest of it. But, at the end of the day, it will be judged on whether you are maliciously using a random test or whether it is effectively targeting, even on a random basis, those areas of highest risk.

It will certainly have a detrimental effect on the morale of an office if you do one on an office and it comes up a negative—or a positive. We find if there is a problem in there it will in the short term have an impact on morale, but there is a difference between morale and *esprit de corps*. Morale can change on a day-to-day basis, depending on whether you had an argument with your partner when you left in the morning. *Esprit de corps* is that commitment to the body, commitment to the profession, commitment to the organisation, and I suspect that would not change whether you had random or targeted tests.¹⁸

3.27 The Ombudsman also noted the potential for integrity testing to be accepted over time:

I would just go back to my point about the internal culture, it might be that initially there would be difficulty in an industrial sense, but based on the evidence as I understand it from overseas forces who do this, eventually it is the workforce itself that agrees to these regimes because they see it as a way of controlling those with a propensity to corruption and it also enables them to have a higher degree of individual integrity. It is something that then grows organically within the organisation rather than it being seen as being imposed from without.¹⁹

3.28 The committee notes that the effect of any proposed integrity testing program on the morale of an agency is an important consideration, however, the committee also notes the corrosive impact upon an agency of corrupt conduct and the need for organisations to have the appropriate tools to combat such corruption.

18 Detective Superintendent Tony Flack, Western Australia Police, *Committee Hansard*, 9 September 2011, p. 6.

19 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 19 August 2011, p. 41.

Inducement

3.29 Several witnesses observed possible legal issues relating to integrity testing, in the form of inducement. AGD used the example of provisions within the controlled operations legislation, noting that integrity testing involves similar considerations. Authority for a controlled operation cannot be granted if the operation is likely to induce a person to commit an offence that they would not otherwise have intended to commit.²⁰

3.30 AGD further noted that if it is considered that an integrity test induced an individual to commit an offence, the evidence may be excluded from court. If the outcome of the test was used to inform disciplinary action or termination of employment, procedural fairness issues would apply.²¹

3.31 AFP witnesses, appearing before the committee in 2009 explained that a working group had been established to consider in depth the way in which an integrity testing regime might work. One of the issues under consideration then was entrapment. Commander Walters noted that:

One of the roles of the working group at the moment is to get very clear definitional parameters around exactly what sort of integrity testing the AFP would want to implement. That could be an incremental approach over a period of time. We might start with some very focused integrity tests and build on that over a period of time. Certainly the issue of entrapment is something that has been worked into the development of the regime that has also been looked at by the working group.²²

3.32 Assistant Commissioner Paul Jevtovic assured the committee at that time that:

Existing and prevailing legislation would continue in the area of entrapment, particularly the robust entrapment legislation in our controlled operations legislation, so we would see no weakening or diminishing of that existing legislation and we would be working within it; that is for sure.²³

3.33 The committee explored inducement further and was advised that:

The term 'entrapment' is also linked to the term 'inducement', and that is the term more commonly used in our legal framework, but the two are the same. It is when an inducement is inherent or when a fact is inherent in the integrity test that leads a person who is the subject of the test to make the wrong decision. The inherent principle of integrity testing is that there be clear, equal opportunity for a person who is subject to the test to pass the test or fail the test. An inducement would be where the factors relating to

20 AGD, *Submission 5*, p. 3.

21 AGD, *Submission 5*, p. 3.

22 Commander Mark Walters, AFP, *Committee Hansard*, 23 October 2009, p. 18.

23 Assistant Commissioner Paul Jevtovic, AFP, *Committee Hansard*, 23 October 2009, pp 18–19.

how the test was developed and then applied would skew that need for an equitable approach.²⁴

3.34 ACLEI advised that inducement and entrapment have been previously considered by the High Court:

Bunning v Cross is the leading case around admissibility of evidence and the factors that are to be taken into account if evidence is improperly obtained. Ridgeway was specifically on the issue of entrapment, and that is where the High Court said that there is no defence of entrapment at law in Australia, but under certain circumstances taking into account factors, it may be appropriate for certain evidence not to be admissible.²⁵

3.35 Noting that integrity testing has been used in states and territories, the committee sought evidence on whether there had been any failed case because of bad operational procedures on integrity testing. The NSW Police and WA Police, as well as ACLEI, advised that that they were not aware of any case law specifically on a failed integrity test in Australia.²⁶

3.36 AGD confirmed that controlled operations legislation already contains constraints relating to inducement and would enable some types of integrity testing:

In those provisions, you cannot approve a controlled operation if it would induce an individual to commit an offence they would not otherwise have committed. That exclusion from controlled operations is expressly directed at that situation, so you cannot offer someone who would never have otherwise contemplated undertaking criminal activity an opportunity that induces them to do something that they would not otherwise have done. Otherwise officers will lose their immunity from criminal liability and civil liability because the authorisation would be invalid.²⁷

The department's view is that if you are going to conduct an integrity test that involves the officers who are setting up the test engaging in criminal activity or incurring civil liability, the controlled operations regime is the appropriate way to do that. A lot of thought has been put into the authorisation arrangements and thresholds and safeguards in that regime. We think it would be more appropriate to consider whether some adjustments needed to be made to that regime in those circumstances. Leaving \$20 or a wallet on a table does not require the use of a controlled operation, and does not require legislation.²⁸

3.37 The committee further considers the use of covert policing powers in its consideration of a possible legislative framework for integrity testing in chapter 4.

24 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 4.

25 Ms Sarah Baker-Goldsmith, ACLEI, *Committee Hansard*, 19 August 2011, p. 4.

26 Ms Sarah Baker-Goldsmith, ACLEI, *Committee Hansard*, 19 August 2011, p. 5.

27 Ms Sarah Chidgey, AGD, *Committee Hansard*, 19 August 2011, p. 20.

28 Ms Sarah Chidgey, AGD, *Committee Hansard*, 19 August 2011, p. 24.

Potential for abuse

3.38 AFPA highlighted the risk of an integrity testing program being abused, citing previous instances of police corruption in state jurisdictions where senior officers in charge of internal security were implicated.²⁹ Mr Torr suggested:

Let us suppose that a junior whistleblower was starting to express concerns [about corrupt conduct at senior levels], what a good way to sort him out and send him a few dirty emails, see what he does with them, 'You have failed our internet usage policy, good bye.' Of course it is in the high levels of all organisations that the risk is the greatest.³⁰

3.39 In order to mitigate such risks, AFPA advised the committee that any integrity testing program should be subject to strict accountability measures, specifically, oversight by ACLEI and the Parliament.³¹

3.40 ACLEI similarly noted that it would be reasonable to expect that accountability arrangements would be established to guard against misuse of official powers, although it did not suggest a specific form of accountability.

The relationship between integrity testing and other integrity measures

3.41 The committee considers it important to understand how the possible introduction of integrity testing would work in conjunction with, or on top of, existing integrity measures.

3.42 AFPA observed that, in the case of the AFP, a considerable number of integrity measures are already in place, and it did not see why the addition of integrity testing was justified. Mr Jim Torr elaborated on this point, remarking:

We are also alert to the fact that every new idea or notion in relation to scouring police for fault and searching for failure is heaped on police in the first instance before anyone else. There are many other professions which we would argue are just as accountable and just as subject to compromise by corrupt conduct as police forces, and yet police in the first instance always seem to attract these sorts of intrusions.

These are intrusions which come on top of many, many other accountabilities that our members already face. We were also jointly responsible for developing security in the AFP context: comprehensive security clearance processes, which actually look at family members and friends, et cetera; initial and regular financial disclosure of assets and debts; random and targeted drug testing of which the AFPA was a joint partner in developing the AFP program; critical incident drug and alcohol testing; loss of superannuation for corruption offences; of course all the criminal

29 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, p. 47.

30 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, p. 47.

31 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, p. 47.

sanctions; the obligations to provide information under direction; and there are many other aspects to the accountability we already provide.

Having said all that, we have not seen the argument put in front of us that would now justify another intrusion into the normal process of police business and police accountability.³²

3.43 The Commonwealth Ombudsman noted that while integrity testing is appealing in its simplicity, he remained unsure as to whether it is an effective means to prevent corruption, preferring approaches aimed at developing a culture of integrity. Specifically, the Ombudsman described integrity testing as a means to catch 'bad apples', rather than helping to prevent corruption. For this reason, the Ombudsman saw it as the wrong approach for a federal anti-corruption agency.³³

3.44 However, ACLEI argued that integrity testing was warranted as an efficient investigation tool, justifying its introduction. As the Integrity Commissioner explained:

...[I]n terms of efficiency, if you can cut through by the use of one method and get to a result where otherwise you might take the long way around using other methods, I think this is to be welcomed. The other point I have just been reminded of is that sometimes it is not just a question of detecting corrupt conduct; sometimes it is a question of disruption. You might have an officer or a group of officers who are under suspicion and we just cannot quite get the evidence that they are engaging in corrupt conduct or how they are engaging in corrupt conduct. But integrity tests might reveal something lesser, such as a sound reason for disciplinary procedure, and that would certainly be applied. There is that consideration also in an integrity testing regime.³⁴

3.45 The Integrity Commissioner noted in evidence to the committee that there is no crisis of confidence in federal public administration generally or in law enforcement agencies. However, problems of the conscious opponent and the invisibility of corruption:

...make it difficult to detect and gather evidence about corrupt conduct in a law enforcement environment, and we should not underestimate the challenge involved. Accordingly, I believe it would be timely now to add integrity testing to the options available to combat corruption. It will not be a panacea and it will not be the right method for every agency or in every instance; however, for the right situations, it will be useful to have the ability to conduct integrity testing.

It would be ill-advised to rely only on shared values and trust, as important as those factors are. This principle reminds us that a seemingly appropriate culture and a seemingly effective control environment will not always mean

32 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, p. 44.

33 Commonwealth Ombudsman, *Submission 1*, p. 3.

34 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 8.

that everyone will resist temptation or manipulation by outside forces. It also reminds us that not all opportunities for corrupt conduct can be easily removed or controlled. Accordingly, some checking is required, and the form that this checking takes must be matched to the challenge.

The integrity testing method offers an additional option for skilled investigators to dismantle the levels of secrecy and deceptive behaviour that characterise corrupt conduct. For these reasons, I see a place for integrity testing. When used in the right circumstances, the method would improve the efficiency of corruption investigations.³⁵

3.46 ACLEI accordingly sees the introduction of integrity testing as a useful adjunct to existing integrity measures. The Integrity Commissioner noted that previous investigations could have benefited from the application of an integrity test.³⁶

3.47 The different components of corruption risk, including the means of disrupting each component, were depicted in a diagram in ACLEI's 2010-11 Annual Report. This diagram, reproduced at Appendix 3, indicates that integrity testing is particularly useful in disrupting corruption risk by increasing the possibility of detection and changing the risk calculation for those who might undertake corrupt actions.

Committee view

3.48 The committee notes the importance of considering integrity testing in the context of the broader integrity platform adopted by an agency. Integrity testing is just one of many measures that may be in place and it is important to assess the right mix of measures in light of limited resources.

3.49 The committee is mindful of the above issues, and notes that any integrity testing regime will have to be carefully designed. On balance, however, the committee reiterates its previously stated in-principle support for integrity testing, and further recommends that an integrity testing regime be introduced for certain Commonwealth law enforcement agencies. The committee discusses how such a scheme might look in chapter 4.

Recommendation 1

3.50 The committee recommends that an integrity testing program be introduced for certain Commonwealth law enforcement agencies.

Recommendation 2

3.51 The committee has received evidence about types of integrity testing and recommends that targeted integrity testing be the preferred method.

35 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 2.

36 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 2.

