Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Law Enforcement Integrity Legislation Amendment Bill 2012

The Attorney-General's Department (the Department) is pleased to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to its *Inquiry into the Law Enforcement Integrity Legislation Amendment Bill 2012*.

The Department acknowledges the submissions made by the Australian Crime Commission (ACC), the CrimTrac Agency (CrimTrac), the Department of Agriculture, Fisheries and Forestry (DAFF), the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Customs and Border Protection Service (Customs and Border Protection) and Liberty Victoria in support of the Bill.

The Committee has asked that the Department's submission addresses issues or concerns raised in other submissions published on the Committee's website. The Department has considered all submissions published to date and this submission responds to the issues raised in those submissions.

Integrity testing

Variation or cancellation of integrity testing authority

Civil Liberties Australia (CLA), in its submission to the Committee, has raised concerns with proposed section 15JP to be inserted into the *Crimes Act 1914* by the Bill. New section 15JP will provide that if an authority to conduct an integrity test is varied or cancelled, but a participant in the operation is unaware of the variation or cancellation (and is not reckless about the existence of a variation or cancellation), then he or she is still protected from civil liability under new section 15JO, as if the variation or cancellation had not been made. CLA submits that proposed section 15JP should also impose a duty on the staff member responsible for the integrity testing operation to inform all participants in the operation of the variation or cancellation within the shortest period of time possible. CLA submits that the inclusion of such a duty 'would allow a person to challenge any evidence collected in breach of the revised or cancelled operation under the Evidence Act'.

The effect of proposed section 15JP is to ensure that officers who are unaware of the variation or cancellation are still protected from civil liability under proposed section 15JO. Section 15JP does not affect the admissibility of evidence collected by officers who continue to conduct an integrity test while unaware that the operation has been cancelled or varied. Courts will retain a discretion to exclude evidence obtained in these circumstances in the absence of the express duty suggested by CLA.

Prohibition on disclosure of integrity testing information

CLA has submitted that the prohibition on disclosure of integrity testing information in proposed 15JQ of the *Crime Act 1914* is over-broad on the grounds of freedom of speech and 'right to know' principles. CLA has suggested that the prohibition be time limited to a set period, for example, five years from the end of the operation.

The Department considers the prohibition on disclosure of integrity testing information is necessary for operational reasons and to protect the privacy of individuals, and that these concerns outweigh freedom of speech and 'right to know' issues.

Integrity testing is intended to have a strong deterrent value. It is important that a person subject to an integrity test does not know he or she is subject to an integrity test. It is equally important that when an officer is considering acting corruptly, that he or she cannot be confident that he is not in fact being made subject to an integrity test. For this reason it is necessary for law enforcement agencies to keep confidential methodologies used in integrity testing operations. If law enforcement agencies were made to routinely disclose information about integrity testing operations, it would be difficult to ensure integrity testing remained covert and undetected.

Similarly, it is important to keep confidential the identities of persons targeted by integrity testing. An integrity test will offer the target an equal opportunity to pass or fail. It is expected that many targets will pass an integrity test. If it is revealed that a person has been the subject of an integrity test, notwithstanding that the person has passed, there could be damaging consequences for the person's reputation, particularly amongst the person's colleagues. Even if the name of the target was suppressed in any disclosure, the disclosure of the details of an integrity test in many cases would be sufficient to allow the identification of the target, or speculation regarding the targeted area. This could also have a damaging effect on the morale of the targeted agency.

The Department considers the prohibition on disclosure to be an important safeguard on the conduct of integrity test. The Department notes that Liberty Victoria, amongst other organisations, has noted in its submission that the Bill strikes the correct balance between the subject's right to privacy with appropriate limitations on undue interference. Any lessening of the proposed prohibition on disclosure would undermine that balance.

CLA has also indicated in its submission that it questions the lack of a fault element in the proposed offence in new section 15JR(1)(c)(ii) and suggested that the fault element be one of recklessness. As noted in the explanatory memorandum for the Bill, recklessness is in fact the fault element for this offence. The Criminal Code provides that where the law creating an offence does not specify a fault element for a physical element that consists of a circumstance or a result, as is the case here, recklessness is the fault element for that physical element.

Application provisions

Item 30 of Schedule 1 of the Bill clarifies that once these amendments have commenced, an integrity testing authority can be granted based on circumstances which arose before, on or after the commencement of these amendments, including the suspicion of an offence that was committed before, on or after commencement. CLA has indicated that it is not comfortable with the retrospectivity of this provision and the fact that it would enable a test to be authorised on the basis of 'very old allegations'. The Department considers that the provision is necessary to ensure that a test can be authorised in circumstances where it is unclear when the suspected misconduct occurred, or where the suspected misconduct occurred shortly before the commencement of the amendments. The Department notes that before authorising an integrity testing operation the authorising officer must be satisfied that it is appropriate in all the circumstances to do so. In circumstances where the suspicion of misconduct is very old, it is less likely that an authorising officer can be so satisfied.

Agencies subject to integrity testing

CLA in its submission indicates that it considers there is no apparent reason why integrity testing be confined to three agencies, and has suggested that if Government wishes to introduce integrity testing that it consider extending testing to other agencies with regulatory powers such as the Department of Veterans Affairs, the Australian Taxation Office and the Department of Agriculture Forestry and Fisheries.

The Department considers that the three agencies to be made subject to integrity testing (the ACC, AFP and Customs and Border Protection) have unique powers and responsibilities that make them a particularly attractive target to corruption. Furthermore, officers of these agencies are often trained in covert investigative and surveillance techniques. This can make corrupt officers particularly capable of avoiding detection. It is appropriate that these agencies be given unique powers to detect corruption in their ranks.

Use of Tracking Devices without Warrant

In its submission to the Committee, CLA has raised concerns about the provisions (proposed new subsection 39(3A) of the *Surveillance Devices Act 2004* (SD Act)) that provide for the use of a tracking devices without a warrant for the purposes of an integrity operation. CLA suggests that the SD Act currently provides only one ground for the use of a tracking device without a warrant, which is for the purposes of locating and the safe recovery of a child to whom a recovery order relates. This is incorrect.

Existing subsection 39(1) of the SD Act provides that a law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant in the investigation of a relevant offence. A relevant offence is defined by the SD Act and includes offences against the law of the Commonwealth that is punishable by a maximum term of imprisonment of 3 years or more or for life.

The SD Act (subsection 39(8)) provides that an appropriate authorising officer must not give permission under section 39 for the use, installation or retrieval of a tracking device if the installation or retrieval involves entry onto premises without permission or an interference with the interior of a vehicle without permission. Subsection 39(8) of the SD Act will apply to proposed new section 39(3A), and a surveillance device warrant would be required if the use of the tracking device involved entry onto premises, or interference with the interior of a vehicle, without permission.

Human rights of AFP members

The Australian Federal Police Association (AFPA) has expressed concerns in its submission that investigations into integrity of AFP members can often result in increased stress and impact on the human rights of the members under investigation. The AFPA is concerned that the introduction of integrity testing may exacerbate these impacts, and has suggested that this be subject to ongoing monitoring by the inclusion of a 'Statement of Compatibility with Human Rights' to be included in each ACLEI annual report.

The Department notes that integrity testing will be conducted covertly so that the subjects of the tests are not aware they are under investigation. The Department also notes that there will be minimal public reporting on the conduct of integrity tests. This is necessary to ensure the confidentiality of integrity testing methodologies and the privacy of individuals subject to testing.

These confidentiality requirements would limit the scope for any public reporting of the ongoing impact of integrity testing on targets. Furthermore, as noted in the statement of compatibility with human rights included in the explanatory memorandum for the Bill, any interference with human rights is both reasonable and proportionate.

Concurrent operation of integrity testing and AFP professional standards

The AFPA has suggested that a provision be included in the Bill which states that any behaviour which is subject to an AFP Professional Standards investigation cannot be the subject of an integrity testing operation.

The Department considers that such a provision would be inappropriate. As a powerful investigative tool, it is intended that integrity testing only be used for the most significant cases of misconduct, where criminal behaviour is suspected. There is a wide spectrum of misconduct which could give rise to an AFP Professional Standards investigation. At the outset of any investigation, the extent of any suspected misconduct is likely to be unclear. It is important that the AFP is not precluded from using integrity testing as an investigative tool in circumstances where a Professional Standards investigation has commenced.

Furthermore, the Bill will allow integrity testing of AFP officers to be authorised by the Integrity Commissioner. While the Integrity Commissioner often works in collaboration with the AFP, it is an important aspect of the role that the Integrity Commissioner that he be able to conduct investigations independent from the agencies within his jurisdiction. To limit the Integrity Commissioner's power to investigate where an internal AFP investigation is underway would be an inappropriate interference with the independence of the office.

Oversight of extension of integrity testing operations

The AFPA has suggested that a provision be included in the Bill that requires any extension of an integrity testing authority beyond 12 months to require the personal approval of the Integrity Commissioner.

The Department considers that it is more appropriate for an officer of the agency which initially authorised the integrity test to be the decision maker in relation to any extension of the integrity test. The Department notes that the Integrity Commissioner's oversight role will cover extensions of integrity tests and each extension or variation must be notified to the Integrity Commissioner. The Department also notes that the maximum duration of an integrity testing operation is 24 months.

Drug and alcohol testing

The Community and Public Sector Union (CPSU) has expressed concerns that the Bill would allow for drug and alcohol testing in a broad range of circumstances, in particular under proposed section 16C of the *Customs Administration Act 1985* which the CPSU states would allow for testing 'for any, or no, reason'.

Proposed section 16C is intended to allow for mandatory 'random' testing of Customs workers. It is intended to complement the powers under proposed section 16B (testing as the result of an allegation) and section 16D (testing of persons following serious incidents).

The ability to have a randomised approach is essential to ensure that Customs and Border Protection remains drug and alcohol free. The powers to authorise testing under section 16B and 16D only allow for testing after an incident or allegation has occurred. Section 16C will allow Customs and Border Protection to proactively manage potential integrity issues, strengthening integrity in the agency.

The CPSU has also recommended that any Regulations dealing with processes for drug and alcohol testing be developed in consultation with employees and the CPSU. The Department understands that Customs and Border Protection has commenced consultation with the CPSU about the measures in this Bill, including the measures relating to drug and alcohol testing.

Declaration of 'serious misconduct'

The CPSU has expressed strong concerns regarding proposed section 15A of the Customs Administration Act, which would allow the CEO of Customs and Border Protection to declare that the termination of an employee was for serious misconduct. The effect of such a declaration would be to limit the ability of the employee to seek a review of his or her termination under the *Fair Work Act 2009.* The CPSU has indicated that the Bill does not establish procedures that guarantee procedural fairness.

The Department notes that the submission made by Customs and Border Protection to the Committee provides greater detail on the power in section 15A, and how the power will be exercised. The submission from Customs and Border Protection addresses a number of the issues raised by the CPSU.

It is important to note that the new power in proposed section 15A does not provide a new mechanism for the dismissal of employees. The power to make a declaration of serious misconduct only applies once a person has been dismissed and is separate to the dismissal process. The new power provided in the Bill does not alter or reduce the obligation on Customs and Border Protection to accord the person fair process when determining whether or not they have breached the Code of Conduct, and if they have, whether they should be dismissed as a sanction for that breach.

Reporting of Misconduct

The CPSU has expressed concerns with proposed section 4B of the Customs Administration Act which would allow the CEO of Customs and Border Protection to issue orders, including orders requiring the mandatory reporting of misconduct or corruption. The CPSU notes that it will be important that employees know exactly what conduct is reportable under these provisions, and to whom it must be reported. The CPSU also recommends that Customs and Border Protection consult with the CPSU in developing mandatory reporting obligations.

The Department notes that while the Bill provides the power for the CEO to make orders, including order requiring mandatory reporting, the Bill does not include provisions that require mandatory reporting. An obligation to report corruption or misconduct will only arise once the CEO has made an appropriate order. Any such order will make clear the person or persons to whom a Customs and Border Protection officer is required to make the disclosure, and the nature of information that is required to be disclosed.

The CPSU has recommended that the orders that can be made under the proposed provision be limited to mandatory reporting of criminal or corrupt conduct. The Department considers such a limitation would not be of assistance in enabling Customs workers to know that misconduct should

be reported as it would require Customs workers to make an assessment of whether observed misconduct amounts to corruption or criminal activity.

As previously noted, the Department also understand that Customs and Border Protection has commenced consultation with the CPSU on the measures included in this Bill, including the measures relating to the CEO's orders power.

Telecommunications data

In its submission to the Committee the Crime and Misconduct Commission of Queensland has suggested further amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to allow the use of telecommunications data in disciplinary proceedings against former Queensland public service employees, including police officers.

Section 178 of the TIA Act provides that an authorised officer of an enforcement agency (as defined in section 5 of the TIA Act) may authorise the disclosure of information or documents (telecommunications data) if they are satisfied that the disclosure is reasonably necessary for the enforcement of the criminal law. An authorisation may also be made under section 179 of the TIA Act if the authorised officer is satisfied that the disclosure is reasonably necessary for the enforcement of a law imposing a pecuniary penalty or for the protection of the public revenue.

Once obtained, telecommunications data may only be disclosed or used if it is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty of for the protection of the public revenue (see section 182 of the TIA Act). Where the disciplinary proceedings relate to one of these purposes, the telecommunications data would be able to be disclosed and used.

These provisions apply to all enforcement agencies which include, amongst other agencies, the ACC, ACLEI, Australian Federal Police (AFP), Customs and Border Protection and the Crime and Misconduct Commission of Queensland.

The Bill does not contain any amendments to the section of the TIA Act which relate to when agencies may authorise disclosure of telecommunications data or those relating to the secondary disclosure or use of telecommunications data.

The Department notes that the Parliamentary Joint Committee of Intelligence and Security is currently conducting an Inquiry into potential reforms of national security legislation which includes the operation of the TIA Act.