



Integrity Testing

Submission of the Australian Federal Police Association to the
Senate Committee on Legal and Constitutional Affairs

Recommendations

1. A Statement of Compatibility with Human Rights, with a structure similar to that provided in the Explanatory Memorandum pursuant to Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, be prepared for each ACLEI annual report, to monitor the impact of integrity testing on targets.
2. A proposed item should be included in the Bill which explicitly states that any behaviour that is the subject of a PRS (AFP Professional Standards) investigation cannot be the subject of a targeted integrity testing operation.
3. Where investigations exceed twelve months in duration, a provision be included which requires personal approval by the Integrity Commissioner for each subsequent grant of authority to extend the duration of the investigation.

Introduction

1.1 The Australian Federal Police Association (AFPA) welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs regarding the Law Enforcement Integrity Legislation Amendment Bill 2012. The AFPA's submission will address the Bill's introduction of a targeted integrity testing system for the Australian Federal Police, among other agencies.

1.2 Police Associations have an important role to play in building integrity within their police enterprise. This was acknowledged internationally in the City of New York's *Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department* [the Mollen Report]:

Police unions speak with an especially powerful voice to their membership. Most officers see their union organizations as the guardians of their rights and interests in the face of Departmental rules and Regulations, and an often hostile public.ⁱⁱ

The Australian Federal Police Association Branch of the Police Federation of Australia as a registered Industrial Organisation under the *Workplace Relations Act 1996*, is committed to building integrity and fighting corruption in the Australian Federal Police. Most recently it has demonstrated this role in its submissions to the *Fisher Review* and the consequential amendments to Part V of the *Australian Federal Police Act 1979* establishing AFP Professional Standards (PRS) in its current form.

1.3 The AFPA has conducted extensive research into the various models of integrity testing in use across Australia, and has given detailed consideration to the desirability of such systems being introduced to the unique work context of the Australian Federal Police. Although the AFPA welcomes the incorporation of many of our previous recommendations into the current Bill, the potential impact of the integrity system on our members and AFP workforce cohesion is of paramount concern to the AFPA, and the aim of this submission is to address significant issues which are likely to arise during the implementation of the legislation.

1.4 This submission will address the following issues: workplace culture and the impact of integrity testing on the human rights of AFP members; the Concurrent Operation of Integrity Testing System and AFP Professional Standards; and oversight of protracted operations.

Targeted Testing

2.1 Although the AFPA is generally opposed to the introduction of an integrity testing system for reasons outlined briefly below, during a process of extensive consultation with stakeholders and through submission to various inquiries on the matter, we have determined that a targeted testing system will represent the best outcome for our members for the reason that it is generally more reliable than a random model. Targeted tests would involve more effective use of a variety of sophisticated scenarios when and where they are needed. Because targeted testing will be more limited in scope, the veracity of each test scenario will be higher. And the development of suitable scenarios is the most difficult task undertaken by integrity testing units.ⁱⁱⁱ

2.2 In contrast, random testing would involve the wide use of same situation scenarios triggering perception of the testing as it is conducted, leading to unreliable results. This is also because random integrity tests are conducted in a 'highly visible manner and are well publicised'^{iv} to achieve the object of deterrence. This renders random tests far less effective as a tool in stopping police officers involved in corruption.

2.3 The available empirical data supports this view. The 1996 KPMG audit of integrity testing in the City of New York Police Department showed that of the 826 random tests that were conducted involving 1,811 officers, there was only one test failure.^v

Workplace Culture and the Human Rights of AFP Members

3.1 It is appropriate to consider potential socio-legal issues that may be created within the AFP workforce by the implementation of this legislation. The culture of law enforcement agencies such as the AFP is unique. Members of that workforce must operate within what is often a tremendously stressful and dangerous environment with a consistently high degree of sensitivity, courage and resourcefulness. In the experience of the author, this demanding culture often exerts significant stress upon members, particularly those who are under investigation for alleged misconduct. Under Part V of the *Australian Federal Police Act 1979* (Cth), members are directed not to discuss their matter with other AFP appointees, which can lead to significant social isolation.

3.2 This stress experienced in the workforce can also result in adverse outcomes for the families and loved ones of members, who often experience negative financial and personal consequences while supporting the member through the investigation. While maintaining the integrity of Australia's national police organization is the paramount objective, the AFPA is concerned at the potential for the addition of another integrity regime to the existing system to affect the morale of members.

3.3 This concern is given context by the fact that AFP employees are already subjected to the most personal intrusion of any Australian Police Service, as part of the AFP Integrity regime. At present, AFP members are subject to:

- a) Initial and then regular security clearance processes;
- b) Initial and regular financial disclosure of assets & debts;
- c) Random and Targeted drug testing (currently 100% of the workforce is tested per annum);
- d) Random and Targeted alcohol testing;
- e) Critical Incident drug and alcohol testing;
- f) Loss of superannuation as a result of corruption offences;
- g) Subject to criminal sanction for failing to answer or mislead a PRS Investigator whilst under direction, under section 40VE of the AFP Act;
- h) Subject to the AFP Confidant Network;
- i) Requirement to provide a body sample under Direction;
- j) Compulsory DNA testing;
- k) The integrity/governance framework which includes:
 - Commissioner's Order 2 (Mandatory reporting)
 - Fraud Control & Anti Corruption Plan
 - Security Plan
 - Internal Audit Program;
- l) Subject to the Commonwealth Ombudsman including self-initiated investigations;
- m) Subject to the Australian Commission for Law Enforcement Integrity (ACLEI) where *'ACLEI investigators can access coercive and other powers used in law enforcement, such as telephone interception, electronic surveillance, undercover and controlled operations, search warrants, and passport confiscation. Special ACLEI powers include: the power to enter the premises of a law enforcement agency without prior warning to carry on an*

investigation and seize articles; and the power to apply to a judge for the arrest of a person refusing or attempting to evade giving evidence.’¹;

n) Subject to the Parliamentary Joint Committee on Law Enforcement;

o) And, of course, members of the AFP are subject to ordinary criminal sanctions applicable to all members of the community.

3.4 The AFPA is aware of a current ACLEI investigation into one AFPA member which has exceeded eighteen months’ duration. The member in question was suspended for the entire investigation period, with resulting adverse financial, professional and emotional consequences for both him and his family. While integrity regimes are integral to the maintenance of a professional, responsive and effective police force, it is the AFPA’s view that in the context of the overarching integrity regime applicable to AFP members, that the Bill contributes to a regime which stretches the boundaries of the Right to Protection Against Arbitrary and Unlawful Interference with Privacy provided in Article 17 of the ICCPR. This is for the reason that in light of the existing, effective and extensive integrity regime, which incorporates ACLEI oversight of potential corruption issues within the Australian Federal Police, the question of whether integrity testing serves a legitimate objective is open to debate.

Recommendation: The AFPA recommends that a Statement of Compatibility with Human Rights, with a structure similar to that provided in the Explanatory Memorandum pursuant to Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, be prepared for each ACLEI annual report, to monitor the ongoing impact of integrity testing on targets.

Concurrent Operation of Integrity Testing System and AFP Professional Standards

4.1 Item 2 in proposed section 15 JE states that if the proposed operation is concerned with the integrity of a staff member of the AFP, an integrity testing authority can be applied for by a staff member of the AFP.^{vi} The application can be considered by the Commissioner of the AFP, a Deputy Commissioner, or an SES employee of the AFP who has been authorized in writing by the CEO to perform this function.

4.2 The AFPA is concerned that there is a potential inconsistency between the operation of the Integrity Testing System outlined in the Bill and the concurrent operation of the Professional Standards integrity regime, as provided for in the *Australian Federal Police Act 1979* (Cth).

4.3 The AFPA views the current integrity regime, established under Part V of the *Australian Federal Police Act 1979* as a result of the *Fisher Review*, as a highly effective mechanism for fighting misconduct and corruption. The AFPA submits that the legislation does not adequately consider the implications inherent to the possible concurrent operation of the integrity testing regime with the existing PRS system; nor does it provide grounds on which a referral of a PRS investigation containing multiple potential elements of corruption will be warranted. It is a realistic assumption that acts of corruption will be combined with lesser acts which may breach professional standards, with the result that AFP members may be subjected to concurrent investigations with conflicting and potentially confusing requirements. For example, under s40VE(4) of the *Australian Federal Police Act 1979* (Cth), information conveyed to PRS investigators by members in a directed interview may not be used against that member in subsequent criminal or civil proceedings. However, under several proposed items in the Bill which amend the *Crimes Act 1914*, the *Telecommunications (Interceptions and Access) Act 1979*, and the *Surveillance Devices Act 2004*, information disclosed by members (as third parties or otherwise) in a targeted integrity testing procedure may subsequently be used in criminal proceedings. In the AFPA's view, it is imperative that care be taken to ensure that members remain apprised of their rights at all times, notwithstanding the covert nature of the targeted system.

4.4 In the AFPA's submission to the Joint Parliamentary Committee on the Australian Commission for Law Enforcement Integrity's 'Inquiry into the Operation of the *Law Enforcement Integrity Commissioner's Act 2006*' (2009), the AFPA recommended that an integrity testing system be legislated in an Act of the Commonwealth Parliament, such as amendment to the *Law Enforcement Integrity Commissioner Act 2006*, with scope to cover, among others, clarification of the operation of concurrent legislation. It is the AFPA's view that a proposed item should be included in the Bill which states explicitly whether behaviour which is the subject of a PRS investigation can also be the subject of a targeted integrity testing operation.

<p>Recommendation: A proposed item should be included in the Bill which explicitly states that any behaviour that is the subject of a PRS (AFP Professional Standards) investigation cannot be the subject of a targeted integrity testing operation.</p>
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Oversight

5.1 It is notable that under s15JK, the Bill in its present form allows for extension of integrity testing authorities by variation to a period of 24 months in total, subject to a 'reasonable belief' that the target AFP member is likely to commit, is committing, or has committed a crime punishable by more than 12 months' imprisonment. Under s15JG(3), an authorizing officer may grant an authority for an integrity testing operation even if the operation has been the subject of a previous application or has previously been authorized.^{vii} The AFPA notes that due to the difficulty of detecting corruption within law enforcement, a lower threshold will generally be required to invoke a 'reasonable' belief that a member will or has committed a crime.^{viii} However, the AFPA is concerned at the potential for investigations to be extended for a significant period of time, and notes that in practice some recent investigations for corruption have been concluded in years rather than months. Where the investigation concerns an individual, the AFPA is concerned that protracted investigations have the potential to unfairly prejudice the future career of members. This is so even where the allegations have not been substantiated, due to the nebulous and secretive nature of corruption. For this reason, we submit that where investigations exceed three years in duration, that a provision be included which requires personal approval by the Integrity Commissioner for each grant of authority which extends the duration of the investigation beyond a twelve-month period.

<p>Recommendation: Where investigations exceed twelve months in duration, a provision be included which requires personal approval by the Integrity Commissioner for each subsequent grant of authority to extend the duration of the investigation.</p>

Conclusion

6.1 The AFPA recognises that integrity testing will form a useful role within a comprehensive strategy of building integrity within the AFP and other Commonwealth agencies. It is commendable that the AFP executive is considering the implementation of an integrity testing regime at a time where there is no known widespread corruption in the organisation. This provides a stark contrast to the oft-cited example of widespread corruption in New York City during the 1980s and 1990s which led Mayor Rudolph Giuliani to commission the Mollen Report. The results of that report led to targeted testing being adopted, and soon thereafter it was consequently in every Australian state jurisdiction including the Northern Territory.

6.2 As in other jurisdictions, the rationale behind the adoption of targeted testing at federal level is cogent: it is effective, economical and better maintains the morale of the force than other models of integrity testing. However, some practical obstacles to the implementation of the legislation within the unique context of the Australian Federal Police remain, and it is in the spirit of resolving these obstacles that the AFPA makes this submission. The recommendations in this submission will both facilitate the cultural acceptance of integrity testing by AFP members and strengthen the credibility of law enforcement operations within its jurisdiction.

ⁱ New York City, Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, *Commission Report* (1994) 126.

ⁱⁱ Ibid.

ⁱⁱⁱ J Shawyer, *Integrity Testing Research Documents*, (Victoria Police, 1997).

^{iv} Ross Homel, 'Integrity Testing' in Tim Prenzler and Janet Ransley (eds), *Police Reform* (2002) 160, 165.

^v Homel, 168.

^{vi} Law Enforcement Integrity Legislation Amendment Bill 2012 (Explanatory Memorandum), 19.

^{vii} Ibid 21.

^{viii} Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry Into Integrity Testing* (November 2011) 35.