



CPSU (PSU Group) Submission

Law Enforcement Integrity Legislation (Amendment) Bill 2012

Senate Standing Committee on Legal and Constitutional
Affairs

October 2012

Introduction

The PSU Group of the Community and Public Sector Union (CPSU) is an active and progressive union with approximately 60,000 members. The CPSU represents employees of the Australian Public Service (APS), the ACT Public Service, the Northern Territory Public Service, other government bodies, the telecommunications sector, call centres, employment services and broadcasting.

The CPSU is the principal union representing workers in the Australian Customs and Border Protection Service (Customs), Australian Transaction Reports and Analysis Centre (AUSTRAC), CrimTrac Agency, the Australian Crime Commission (ACC), the Department of Agriculture, Fisheries and Forestry (DAFF), and the Australian Commission for Law Enforcement Integrity (ACLEI). The CPSU also represents unsworn officers in the Australian Federal Police (AFP).

The CPSU takes issues of corruption and criminal conduct very seriously and supports efforts to prevent corruption in Commonwealth law enforcement agencies. Corruption and abuse of power not only threatens Australia's national security but it compromises the work and safety of CPSU members who take pride in the work that they do. The CPSU has been, and will continue to, work with Commonwealth agencies to implement strategies which uphold the integrity of these agencies and try to ensure that they are free of corruption and criminal conduct.

The CPSU is concerned about the substantial powers that the *Law Enforcement Integrity Legislation Amendment Bill 2012* (the Bill) gives to Agency Heads which have the potential to undermine employees' right to privacy, remove their rights to procedural fairness and undermine the level of trust in the workplace. To justify such powers, the Government should show that these powers will have a material effect on reducing corruption, that there are no less intrusive ways of achieving the same goal and that there are sufficient safeguards in place to ensure that those powers cannot be misused. There is little evidence that many of the measures proposed by the Bill would prevent corruption and criminal conduct.

There are three parts to the Bill: the introduction of targeted integrity testing for the AFP, the ACC, and Customs; the extension of the jurisdiction of ACLEI to AUSTRAC, CrimTrac, and parts of DAFF; and amendments to the *Customs (Administration) Act 1985* (*Customs Act*) to act against corruption and misconduct.

The concerns raised in this submission, while touching on all aspects of the Bill, primarily relate to the amendments to the *Customs Act*. There are three main amendments we seek to address:

- the introduction of drug and alcohol testing;
- mandatory reporting of misconduct; and
- the power of the CEO of Customs to issue a declaration stating that an employee has been dismissed for serious misconduct.

Drug and alcohol testing

The Bill proposes to introduce sections 16B – 16H into the *Customs Act*. These provisions permit authorised officers to require a Customs worker to undergo alcohol or drug screening tests in certain circumstances including when it is suspected that the Customs worker is under the influence of alcohol, or where a person is killed or seriously injured.

Proposed section 16C is more general. It would allow an authorising officer to provide a written direction for a Customs worker to undergo a drug or alcohol test at any time for any, or no, reason in accordance with the regulations.

Section 16E provides for regulations to be made which would establish requirements for who may administer the tests, how the tests are administered, how results are collected and analysed and the confidentiality of the results. At this time, no proposed regulations have been made available to the CPSU.

In principle, the CPSU does not object to alcohol and drug testing in certain situations. However, the CPSU is concerned that circumstances in which the Bill permits alcohol and drug testing go beyond the stated purposes of the Bill and the behavior that the Bill is trying to combat.

The Explanatory Memorandum to the Bill states that the purpose of these amendments is to 'enhance the powers of the CEO of Customs and Border Protection to deal with suspected corrupt conduct'¹. However, the proposed sections 16B – 16H of the *Customs Act* would permit any employee to be required to undergo a drug or alcohol test at any time regardless of whether they were suspected of corruption.

While the intention of this scheme is sound, the proposed system would be open to abuse. The CPSU is concerned that wider implementation of drug and alcohol testing could undermine the level of trust between Customs and its employees. There is a risk that employees could be unfairly targeted for tests and individuals or groups of employees could be harassed by repeated requests for drug and alcohol tests. Furthermore, the Bill does not place limits on how the results from the tests may be used and whether results can be used in non-corruption related disciplinary proceedings.

This is of particular concern given that the definition of prohibited drugs is broad enough to include prescription medication. The Bill defines a prohibited drug as a narcotic as defined in the *Customs Act 1901* ('any border control substance or plant'²) or any other substance as defined in the regulations.

Although Customs have indicated that this broad definition is only intended to capture those employees who abuse prescription drugs, serious incursions into an employee's privacy may be required to determine whether an employee is abusing a prescription drug or not. This would include accessing confidential medical records and asking employees to justify their use of certain medications.

Given all of the above, it is important that the legislation is as specific as possible in setting out the range of situations in which alcohol and drug tests are permitted and how the results may be used.

¹ Explanatory Memorandum, *Law Enforcement Integrity Legislation Amendment Bill 2012*, p 1

² *Customs Act 1901*, s 4

Customs should also undertake thorough consultation with its employees and the CPSU in developing the regulations and implementation of this scheme.

Recommendations:

- The Bill should be more specific about circumstances in which drug and alcohol tests may be used and how the results may be used. Specifically the Bill should exclude prescription medications.
- Regulations about processes and procedures for drug and alcohol tests are developed in consultation with employees and the CPSU.

Power to dismiss an employee after loss of confidence

The Bill proposes to introduce section 15A into the *Customs Act*. Section 15A would allow the CEO of Customs to terminate the employment of a staff member and issue a declaration that the CEO believes that the staff member engaged in serious misconduct. When the CEO makes such a declaration, then the employee does not have access to the unfair dismissal protections or the termination of employment entitlements in the *Fair Work Act 2009*.

The CEO may issue a declaration if the CEO believes on reasonable grounds that the staff member's conduct or behaviour:

- amounts to *serious misconduct* by the staff member; and
- is having, or is likely to have, a damaging effect on:
 - the professional self-respect or morale of some or all of the members of Customs staff; or
 - the reputation of Customs with the public, or any section of the public, or with an Australian or overseas government, or with a person or body (however described) to whom the CEO may authorise disclosure of information.

The Bill defines serious misconduct as:

- corruption, a serious abuse of power, or a serious dereliction of duty, by the Customs worker; or
- any other seriously reprehensible act or behaviour by the Customs worker, whether or not acting, or purporting to act, in the course of his or her duties as a Customs worker.

These provisions would give the CEO of Customs a broad discretion to terminate the employment of a Customs staff member without the staff member having any rights to procedural fairness or independent review of the decision. There is no evidence that existing termination provisions are inadequate for dealing with corruption or that removing unfair dismissal rights would assist in the matter. As is detailed below, this would seriously curtail employees' rights to natural justice, without being necessary or effective in combating corruption within Customs.

Procedural Fairness

The Bill does not establish any procedures that must be followed to ensure that an employee receives fair treatment in this process.

Basic principles of procedural fairness dictate that a person should have the right to be told what they are accused of, given a chance to respond to the allegations and have their response genuinely considered by the decision maker. The ILO Termination of Employment Convention 1982, which Australia has ratified, states:

Article 7 - The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity³.

However, the only procedural requirement in the Bill is that the CEO provides the staff member with a copy of the declaration within 24 hours of the decision to dismiss the employee. There is no right of consultation or reply, or a requirement for reasons to be given.

CPSU understands that in cases where corruption is suspected there may be an imperative to remove an employee from the workplace as soon as possible. However, there are other means to achieve this which preserve an employee's rights to procedural fairness and are in line with Australia's obligations at international law. This could include a provision which would allow the CEO to stand an employee down with or without pay if the CEO suspects an employee of serious misconduct. Such avenues are currently available to Customs under the *Public Service Act*, and there is no evidence to suggest these are inadequate in dealing with any corruption issue.

Right to review of the decision

The Bill does not provide any right to internal or independent external review of the decision and it specifically exempts employees dismissed under 15A from access to unfair dismissal remedies under the *Fair Work Act*. Again, this is in breach of Australia's international law obligations. The Termination of Employment Convention states:

Article 8 – [unless authorised by a competent body] A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator⁴.

Without a right of review of the decision, there are no checks and balances on this power to ensure that it is not abused or used for purposes outside those intended by the Bill.

The Bill states that the general protections provisions in Part 3-1 of the *Fair Work Act* still apply in this situation. However, there is currently an ambiguity as to whether that would offer any protection in

³ International Labour Organisation, *C158 - Termination of Employment Convention 1982*, Article 7

⁴ Ibid, Article 8

a circumstance such as this. In order to establish a general protections claim, an employee must show that an employer has taken adverse action. Section 342(3) of the *Fair Work Act* states that adverse action does not include action that is authorised by or under a law of the Commonwealth. There needs to be some clarification that the termination of employment of an employee under this part of the *Customs Act* does fall into this exemption in section 342(3) of the *Fair Work Act*.

However, even if the general protections do apply, they would only offer employees protection if there was an ulterior motive for the dismissal such as a discriminatory reason or because the employee has a workplace right. They would not protect an employee who is merely wrongly accused. In addition, seeking relief under the general protections can also be a costly and lengthy process. A faster and more accessible remedy would be more appropriate.

Therefore, exempting employees from unfair dismissal protections seems unnecessary. There is no suggestion that exempting Customs employees from unfair dismissal would achieve a reduction in the incidence of corruption or assist in its investigation or enforcement.

The CPSU notes that provisions equivalent to those that are proposed by section 15A already exist in the AFP and ACC. The concerns the CPSU raises in relation to the proposed termination powers regarding Customs employees apply similarly for AFP and ACC employees.

Corruption is an equally serious concern in relation to State and Territory police forces. Accordingly, the CPSU has considered the terms of legislation regulating police in State and Territory jurisdictions for guidance as to an appropriate model.

The legislation in all other jurisdictions provides a mechanism for a police officer to apply to seek a review of a decision to terminate their employment. The legislation in New South Wales, Western Australia, Northern Territory and Tasmania give police officers access to an unfair dismissal jurisdiction, Victorian legislation gives access to internal review, and the Queensland and South Australia Acts give access to an external Tribunal review. The Commonwealth will be the only jurisdiction to remove all appeal rights for loss of confidence dismissal. For further detail about these state jurisdictions see [Attachment A](#).

The Second Reading speech states that the decision made by the CEO will follow an assessment and advice from a panel independent of the CEO.⁵ There is however no corresponding provision in the legislation. In our view it is important that such rights to procedural fairness are included in the legislation. Without this, there is no guarantee that such safeguards will not be removed at a later date.

If the Bill passes without such an amendment, the CPSU seeks discussions with Customs and commitments about how that independent panel would operate and of whom it would be comprised.

Given the strong powers provided to the CEO by this provision, there should be scope for review by a party independent of Customs. As a minimum, the panel advising the CEO should include someone

⁵ Hansard, House of Representatives, 19 September 2012, p 15. Clare, J MP, Second reading speech - *Law Enforcement Integrity Legislation Amendment Bill 2012*,

who is independent. However, the process would be enhanced if there was an external review process.

Broad scope of serious misconduct

Given the aim of the Bill, the definition of serious misconduct is too broad and ill defined. It goes beyond corrupt and criminal behaviour and extends to ‘any other seriously reprehensible act or behaviour’ by a Customs worker. Although the CPSU does not condone misconduct, we believe strongly that staff have a right to a proper process in how those allegations are dealt with. It should only be in the most extreme circumstances that the Government could justify limiting those rights.

Given that the Bill as currently drafted allows the CEO of Customs to terminate the employment of a Customs worker without following principles of procedural fairness or natural justice, the circumstances in which this can be used should be limited to those that are absolutely necessary to prevent corruption or criminal conduct. The CPSU does not consider that any of the current circumstances necessitate the removal of procedural fairness, however if it is to be a part of the legislation then the circumstances in which it is permitted should be clearly defined.

The inclusion of a vaguely defined category such as ‘any other serious or reprehensible act or behaviour’ increases the chance that this power could be used for purposes other than those intended by the act and unnecessarily curtail the rights of Customs employees.

The same goes for the broad reference to the damaging effect of the conduct on “some or all of the members of Australian Customs and Border Protection Service” or its reputation with “any section of the public”. The “some” of Customs staff referred to in the provision could be limited to a small group of employees who have run the investigation and are not actually representative of the view of a wider cross section of staff.

The lack of review of determinations by the CEO compounds this danger given that if the CEO gets it wrong, there is no oversight to ensure that the power is only used for the purposes envisaged by the Bill. The Second Reading speech points out that judicial review is still available in this situation. However, the capacity of judicial review to provide effective remedies in an employment situation is limited.

If section 15A is to be included in the legislation, the categories of serious misconduct should be limited to those that are clearly defined and targeted to stopping corruption. This could include limiting the making of declarations to cases of serious criminal offences relating to abuse of power or corruption.

Recommendations:

- Remove subsection 15A from the Bill.
- In the alternative:
 - the Bill should allow the CEO to stand down an employee accused of serious misconduct pending investigation into the matter;
 - create a process for external review of a declaration by an independent body issued under subsection 15A (2);
 - include procedural requirements in section 15A, including that the CEO may only

- issue a declaration on advice of a panel that includes at least one member who is independent of the Agency; and
- limit the definition of 'serious misconduct' to clearly defined behaviour that is targeted to stopping corruption.

Reporting of Misconduct

The Bill proposes to introduce section 4B into the *Customs Act* which enables the CEO of Customs to issue orders in relation to the reporting of misconduct, corruption, or criminal activity by Customs staff members where it affects, or is likely to affect, the operations and responsibilities of Customs.

The Explanatory Memorandum to the Bill explains that this provision gives the CEO the power to compel a worker to give information or answer questions in relation to a matter. The CEO would also be able to create ongoing obligations to report conduct as it arises. Although, proposed section 4C states that self-incrimination does not excuse a staff member from giving information, it states that any information given is not admissible in any proceedings.

Proposed subsection 4B (3) provides that a Customs worker must comply with an order to give information. Therefore a worker could undergo disciplinary action for a code of conduct breach for not complying.

Given the ramifications for employees not providing information, it is essential that employees know exactly what conduct they must report and to whom. As discussed above, the definition of misconduct is broad and not precisely defined. Consideration should be given to limiting the orders that may be made under this section to reporting only criminal or corrupt conduct which are more clearly defined.

In addition, Customs should continue to consult with its staff and with the CPSU to ensure the scope and implementation of the reporting obligations and accompanying policies are clear and understood by all staff. This should include appropriate training.

Recommendation:

- The orders that may be made under this section should be limited to reporting criminal or corrupt conduct only.
- Customs should consult with staff and the CPSU to ensure scope and implementation of the reporting obligations and accompanying policies are clear and understood by staff. This should include appropriate training.

Introduction of targeted integrity testing

The Bill will introduce a system under which targeted integrity testing can be conducted on officers of the AFP, ACC and Customs. The CPSU has raised concerns and sought clarification from Customs about how this integrity testing will be implemented. Issues of concern to the CPSU include:

- The selection and oversight of integrity testing authorities
- Timeframes to conduct an integrity test after authorisation
- Use of information acquired through integrity testing

It is important that integrity testing is implemented in a fair and responsible manner and there are appropriate accountability and oversight mechanisms in place. Agencies should work with staff and the CPSU to ensure that employees have a genuine say about how this is implemented. This will ensure that the implementation of the scheme and accompanying guidelines are developed effectively and understood by staff.

ATTACHMENT A

LOSS OF CONFIDENCE DISMISSAL - STATE JURISDICTION APPEAL MECHANISMS

NEW SOUTH WALES

- *Police Act 1990* (NSW), s 191(d)
- Requirement for procedural fairness to be met before removal for loss of confidence
- An offer can apply for review by the NSWIRC on the basis that it is “harsh, unjust, or unreasonable”

VICTORIA

- *Police Regulation Act 1958* (VIC), s 68
- Sets out a process to be followed. Reasons must be given; employee has a right of reply.
- Appeal board can hear appeals, has the power to reinstate or provide compensation.

QUEENSLAND

- *Police Service Administration Act 1990* (QLD), s 7
- Decision reviewable by the Commissioner of Police Service Reviews (appeal board)
- Merit review also available via the Queensland Civil and Administrative Tribunal

WESTERN AUSTRALIA

- *Police Act 1892* (WA), s 33
- Appeal available to the WAIRC on the basis that the decision was “harsh, oppressive or unfair”

NORTHERN TERRITORY

- *Police Administration Act*, s 78
- An investigation must be conducted, subject to a hearing
- Appeal to Disciplinary Appeals Board

SOUTH AUSTRALIA

- *Police Act 1998* (SA)
- Finding can only be made by the Police Disciplinary Tribunal, after a hearing
- Appeal to the administrative division of the District Court

TASMANIA

- *Police Service Act 2004* (TAS)
- Office notified, asked to respond
- Appeal available via the Police Review Board