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Chair
Senator Trish Crossin
Senate Legal and Constitutional Affairs Committee
Email: LegCon.Sen@aph.gov.au

Re: Law Enforcement Integrity Legislation Amendment Bill 2012
Submission from Civil Liberties Australia

Dear Chair and Committee Members

Given the very short time to respond to this Bill, we make a truncated, but pertinent, submission. In doing so, we note that this Bill involves a major conceptual change to how the Australian Government thinks about and acts on integrity issues by its people. We are surprised that so little time has been allowed for public debate on such an important matter. CLA believes more time for debate should be allowed before this bill passes.

In technical terms:

There is a problem with section 15JP, which omits a duty for the 'responsible staff member' to inform all participants of a variation or cancellation within the shortest period of time possible, having regard to the nature of the operation.
We suggest inclusion of this duty at 15JK and 15JL.

The reason is that if a test is varied/cancelled then a person could still make an admission or engage in conduct, despite the fact that person responsible for the operation hasn't notified the participants to cease or change their approach (this may, for example, be because of a deliberate 'go-slow' to allow participants more time to collect information). Inclusion of a duty would allow a person to challenge any evidence collected in breach of the revised or cancelled operation under the Evidence Act.

We note that this may not sit well with law enforcement bodies: however the Evidence Act's exclusion of 'unlawfully obtained' evidence is discretionary, and a Court can still admit the evidence having regard to various factors.

> **15JK Integrity testing authorities—variation**
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> (1) An appropriate authorising officer for an integrity testing operation that is authorised by an integrity testing authority may, in writing, vary the authority:
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> (a) at any time on the authorising officer's own initiative; or
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> (b) on application, in writing, by the responsible staff member for the operation.
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> (2) A variation may extend, or further extend, the period of effect of the

authority for up to 12 months, but not so that the period of effect ends more than 24 months after the authority was granted.

(3) As soon as practicable after varying an integrity testing authority for an integrity testing operation, the authorising officer must give a copy of the variation to:

(a) the responsible staff member for the operation; and

(b) the Integrity Commissioner (unless the authorising officer is an officer of the Australian Commission for Law Enforcement Integrity).

Note: If the variation has the effect of changing the responsible staff member, the authorising officer would be required to give a copy of the variation to the new responsible staff member.

(4) Subsection 33(3) of the *Acts Interpretation Act 1901* applies in relation to the variation of the authority, subject to this Act.

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* has the effect that the power to grant an instrument (such as an integrity testing authority) includes the power to vary the instrument in the like manner and subject to the like conditions.

(5) A variation is not a legislative instrument.

15JL Integrity testing authorities—cancellation

(1) An appropriate authorising officer for an integrity testing operation may, by order in writing given to the responsible staff member for the operation, cancel the authority at any time and for any reason.

(2) The reasons for cancelling an integrity testing authority under subsection (1) include (but are not limited to) cancellation at the request of the responsible staff member.

(3) Cancellation of an integrity testing authority takes effect at the time the order is made or at a later time stated in the order.

15JP Integrity testing operations—participants unaware of variation or cancellation of authority

(1) If an integrity testing authority for an integrity testing operation is varied in a way that limits the scope of the operation, this Part continues to apply to a participant in the operation as if the authority had not been varied in that way, for so long as the participant:

(a) is unaware of the variation; and

(b) is not reckless about the existence of the variation.

(2) If an integrity testing authority to conduct an integrity testing operation is cancelled, this Part continues to apply to a person who was a participant in the operation immediately before the cancellation as if the authority had not been cancelled in that way, for so long as the person:

(a) is unaware of the cancellation; and

(b) is not reckless about the existence of the cancellation.

(3) For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an integrity testing authority if:

(a) the person is aware of a substantial risk that the variation or cancellation has happened; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk that the authority has not been varied or cancelled.

The unlimited prohibition on disclosure in 15JQ is over-broad, in CLA's opinion, on grounds of freedom of speech and 'right to know'. Disclosure could be time limited (for example, five years after the end of the operation, except where legal disciplinary proceedings are proceeding and/or the disclosure would reveal the name of an informant).

We also question the absence of any fault element for the offence at 15JR(1)(c)(ii). In terms of better legislative drafting, the preceding offence is one of 'intention' so the next one could be 'recklessness'.

We draw the Committee's attention to this provision (without expressing a further view on it), and suggest Committee Members may care to consider any possible 'fair trial' implications:

15JT Evidence of integrity testing authorities

A document purporting to be *(from?)* an integrity testing authority:

(a) is admissible in any legal proceedings; and

(b) in the absence of evidence to the contrary, is proof in any proceedings (not being criminal or disciplinary proceedings against a law enforcement officer) that the person granting the authority was satisfied of the facts he or she was required to be satisfied of to grant the authority.

We are not comfortable with the unlimited retrospectivity of this provision. The Committee may care to note that, while it doesn't criminalise acts retrospectively, it could mean an authorising officer could form a reasonable suspicion and authorise a new operation on the basis of very old allegations.

30 Application of amendments in Part 1

(1) The amendments of the *Crimes Act 1914* made by this Part apply in relation to an integrity testing authority granted (or sought to be granted) on or after the commencement of this Part:

(a) whether the act or omission constituting the suspected offence in relation to which the authority is (or is sought to be) granted occurred (or

is alleged to have occurred) before, on or after that commencement; and (b) whether any other circumstance in relation to which the authority is (or is sought to be) granted occurred (or is alleged to have occurred) before, on or after that commencement.

CLA opposes these provisions:

67 After subsection 39(3)

Insert:

(3A) A federal law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant for the purposes of an integrity operation.

68 Subsection 39(4)

Omit "and (3)", substitute ", (3) and (3A)".

69 Subsections 39(5) and (7)

Omit "or (3)", substitute ", (3) or (3A)".

We note that Section 3 of the *Surveillance Devices Act* provides only one ground for the use of a tracking device without a warrant:

Sec 39

(3) A law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant in the location and safe recovery of a child to whom a recovery order relates.

In this case there is already another order in force (a recovery order). A recovery order is made by a Court and so there is judicial involvement. That wouldn't be the case with proposed section 39(3A).

<u>In philosophical and 'principle' terms</u>:

We comment, on the clauses immediately above, and in general, on the inexorable function 'creep' whereby police and like agencies are absorbing powers to act on their own say-so that have traditionally involved judicial supervisions and approval, by warrant (other than in exceptional circumstances), before police/etc action may be taken. We ask the Committee to require rewriting of the relevant clauses so that the approval power for increasingly intrusive personal and device surveillance remains with the judiciary, and does not further become an automatic police first action.

We note that the Minister responsible for this Bill has claimed, in releases/statements when the bill was announced, that it does not involve "entrapment". By a particularly spurious definition of entrapment, concocted for the Minister's own purposes, it may not: in common parlance, by long-standing understanding, by common sense, this bill

permits the Australian Government to set traps – "entrap" – its employees. CLA opposes entrapment, and believes it should not be permitted by this bill. However, if the parliament persists with lowering Australia's respect for the law in this way, it will be hard for any MP to protest in future if they are treated in a similar fashion to government employees, and subjected to secret baits, bribes and inducements with the results subsequently publicly revealed. CLA can envisage the media perceiving this bill as open slather for politicians to "get as good as they give".

Returning to the depth and breadth of change in integrity monitoring that this Bill authorizes – and assuming that the bill will pass as proposed – we note the following points of principle which the Committee may wish to consider:

a. there is no apparent reason or logic why three (only) agencies – ACC, AFP and Customs – should be singled out for such testing;
b. if an integrity regime is applicable to elements of government with enforcement powers, then it should logically apply to other government departments and agencies with enforcement and punitive/fining powers: Tax, Fishing, Transport, Aviation, Health, Immigration, Medicare, Veterans Affairs, Defence, the Reserve Bank, wheat and other authorities, the secretive agencies (ASIO, ASIS, etc), registration and licensing boards, and so on;
c. if integrity testing of this nature is important to ensure the proper behavior of people on the government payroll who are in key positions of power, where bribery, the taking of 'slings' and other corrupt behaviours are possible, then it would seem that other groups should also be included in the testing, such as ministerial advisers, legal advisers, consultants, etc.
d. taken to its logical conclusion, Members of Parliament themselves are the people in government with the most power. If integrity testing is required of some powerful people on the government payroll, then surely it is needed at the highest level of MPs. A list of former MPs from Australian Parliaments in recent years who have served/are serving jail time could be compiled to support this contention, along with a list of those currently answering charges or expected soon to have charges to answer.

The explanatory memorandum says:

> *Integrity tests are operations designed to test whether a public official will respond to a simulated or controlled situation in a manner that is illegal or would contravene an agency's standard of integrity.*

CLA notes that one of the most dangerous forms of corruption is "process corruption". If the bill is to pass, we ask that the power to investigate – and test for – process corruption be expressly written in. To assist the Committee, we provide an extract from a recent address by a CLA member which defines process corruption, explains its danger and highlights its pervasiveness in 'police' and similar agencies, such as those which are, and should be, subject to this Bill. (Please see Attachment A)

Finally, we note with sadness that the declaration of 'Compatibility with Human Rights' (CWHR) accompanying this Bill is of no practical use whatsoever to the Australian community. Any CWHR statement should include the human rights and freedoms issues/matters considered by the agency/Minister making the statement and the argument(s) for/against whether the Bill is compatible with those issues/matters considered. A one-paragraph statement such as here is a slap in the face to the Australian Parliament which passed the relevant Human Rights Act.

> **Statement of Compatibility with Human Rights**
>
> *Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*
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> This Bill is 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*.

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See Appendix A, which follows: