

Law Enforcement Integrity Legislation Amendment Bill 2012

Introduced into the House of Representatives on 19 September 2012

Portfolio: Home Affairs and Justice

Committee view

1.2 The committee seeks further clarification from the Minister for Home Affairs and Justice on a range of issues in the bill to assist its consideration of the compatibility of the bill with human rights.

1.3 The committee intends to draw its preliminary comments on the bill to the attention of the Senate Legal and Constitutional Affairs Legislation Committee, which is currently undertaking an inquiry into the bill.

Purpose of the bill

1.4 This bill introduces a range of measures which seek to prevent corruption in Commonwealth law enforcement agencies, and to enhance the response of law enforcement agencies to cases of suspected corruption.

1.5 The measures are given effect through amendments to the *Crimes Act 1914*, the *Australian Crime Commission Act 2002*, the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Customs (Administration) Act 1985*, and the *Law Enforcement Integrity Commissioner Act 2006*.

1.6 The key measures contained in the bill are:

- the introduction of targeted integrity testing for the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the Australian Customs and Border Protection Service (schedule 1, part 1) and associated investigative tools, including provision for new surveillance device warrants under the Surveillance Devices Act 2004 and using intercepted information accessed under the Telecommunications (Interception and Access) Act 1979 for integrity operations (schedule 1, part 3);
- extension of the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) to cover AUSTRAC, CrimTrac, and prescribed staff members in the Department of Agriculture, Fisheries and Forestry (DAFF) (schedule 1, part 2); and
- the introduction of measures to bring the Australian Custom and Border Protection Service's powers to act against corruption and misconduct into line with those of the Australian Federal Police and the Australian Crime Commission (schedule 2).

1.7 The committee notes that this is a complex bill that raises a range of human rights issues, in part because of its interaction with a variety of other law

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enforcement legislation. The committee has outlined below some of the initial issues that it has identified with regard to the bill that would benefit from further clarification from the Minister for Home Affairs and Justice. These have been highlighted in **bold**.

Compatibility with human rights

Integrity testing regime

1.8 The amendments relating to integrity testing in schedule 1 of the bill is intended to give effect to a 2011 report by the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, which recommended that integrity testing be introduced for the AFP, ACC and the Australian Customs and Border Protection Service. The committee recommended that testing should be targeted at officers suspected of corrupt conduct and that the heads of these agencies, and the Integrity Commissioner, should be able to authorise testing. The committee also recommended that relevant legislation be amended, if necessary, to allow agencies to use covert policing powers when conducting integrity testing.

1.9 Integrity testing, while clearly seeking to achieve legitimate objectives, raises a number of human rights issues. The overall compatibility of the proposed regime will generally be dependent on whether the legislation provides for adequate safeguards to ensure that the relevant powers are appropriately targeted and circumscribed, and that the implementation of the scheme remains reasonable, necessary and proportionate to the objective of preventing corruption in law enforcement agencies.

Independent monitoring

1.10 The provision of adequate independent monitoring mechanisms is likely to be a key safeguard that goes towards the overall compatibility of such a scheme. The Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity also noted the importance of safeguards to ensure that integrity testing is used in an appropriate manner and to that end recommended, among other things, that provision is made for oversight by the Commonwealth Ombudsman.

1.11 While the bill requires relevant agencies report to the Minister each year on the number and nature of integrity tests undertaken and to notify the Integrity Commissioner when an integrity test is authorised, no explicit provision appears to be made for oversight by the Commonwealth Ombudsman.

1.12 The committee proposes to write to the Minister for Home Affairs and Justice to request clarification for the lack of explicit provision in the bill for independent oversight by the Ombudsman.

Right to a fair trial

1.13 The bill will amend the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to allow existing telecommunications information and existing stored

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communications accessed under the TIA Act to be communicated and used for integrity testing purposes by AFP, ACC and ACLEI.

1.14 The use of intercept evidence in criminal proceedings potentially impacts on the defendant's right to a fair trial in article 14 of International Covenant on Civil and Political Rights (ICCPR). While there is no inherent human rights objection to the use of intercept evidence in criminal trials, overall compatibility with the right to a fair trial will depend on whether a fair balance is struck between protecting the public interest in not disclosing sensitive information and the defendant's right to the disclosure of evidence that might assist their defence.

1.15 The statement of compatibility does not address the issue of whether the use of intercept evidence in integrity testing operations is compatible with the right to a fair trial in article 14 of ICCPR. The statement also does not clarify what, if any, interaction an integrity testing scheme may have with entrapment laws. Entrapment, and the use of evidence obtained by entrapment, may jeopardise the fairness of a trial if the offence for which the defendant is prosecuted has been incited or instigated by law enforcement officers.

1.16 The committee proposes to write to the Minister for Home Affairs and Justice to seek clarification on the following matters:

- **Whether the use of intercept evidence in integrity testing operations is compatible with the right to a fair trial in article 14 of ICCPR.**
- **What, if any, interaction the proposed scheme would have with entrapment laws.**

Expansion of ACLEI jurisdiction

1.17 Part 2 of the bill expands the number of law enforcement agencies covered by ACLEI to include the AUSTRAC, CrimTrac, and prescribed officers of DAFF.

Right to privacy

1.18 The statement of compatibility states that these amendments engage the right to privacy in article 17 of ICCPR because the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) provides that employees of agencies under ACLEI's jurisdiction, or other individuals with information that is relevant to corruption within those agencies, can be required to provide information to ACLEI or to answer questions'.

1.19 The statement notes that:

The ability to require an individual to provide information or answer questions is limited to situations where it will be relevant to an investigation of a corruption issue or the conduct of a public inquiry into corruption. The LEIC Act also prescribes how information that is provided by individuals to ACLEI is able to be used and disclosed. Disclosure is generally only permitted for the purposes of investigating a corruption

issue or other purposes connected with the exercise of the functions of the Integrity Commissioner.

1.20 The committee considers that this measure is unlikely to raise any concerns in relation to the right to privacy in article 17 of ICCPR.

Right against self-incrimination

1.21 Compulsory questioning engages the right against self-incrimination in article 14(3)(g) of ICCPR. The statement indicates that immunity is provided in the LEIC Act to restrict the use of answers given in response to compulsory questioning in subsequent criminal proceedings. However, the statement does not elaborate if this includes both a use and derivative use immunity. Abrogation of the right against self-incrimination is more likely to be considered permissible where it is accompanied by both a use and derivative use immunity.

1.22 The committee proposes to write to the Minister for Home Affairs and Justice to seek clarification on this issue.

Measures relating to Customs and Border Protection

1.23 Schedule 2 to the bill introduces a range of measures to increase the power of the CEO of Customs to detect and deal with corruption within the Australian Customs and Border Protection Service.

(i) Drug and alcohol screening tests

1.24 Item 21 of Schedule 2 creates powers to require Customs workers to undergo alcohol screening tests, breath tests or prohibited drug tests in certain contexts. The new powers enable an authorised officer to:

- direct a worker performing their duties to undergo an alcohol screening test if the authorised officer reasonably suspects the worker is under the influence of alcohol (section 16B);
- give written direction to a worker performing their duties to undergo an alcohol screening or breath test or provide a body sample for a prohibited drug test. (section 16C); or
- give written direction to a worker to undergo testing in certain situations involving the death or serious injury of another person, including in circumstances where the worker is no longer performing their duties (section 16D). The written direction must either be given as soon as practicable after the incident or whilst the worker is in hospital for examination or treatment because of the incident.

1.25 A 'prohibited drug' is defined as a narcotic substance within the meaning of the Customs Act 1901 (ie border controlled drugs) or any drug specified by the Customs and Border Protection CEO in a legislative instrument (section 16H).

1.26 Details of the testing regime are not contained in the bill but will be provided in regulations to be made under new section 16F. The committee notes that it will be difficult to reach a definitive view on compatibility of these measures because the details about the testing regime are not on the face of the bill but will be contained in regulations.

Right to privacy

1.27 Mandatory drug and alcohol testing regimes engage the right to privacy in article 17 of ICCPR.

1.28 The statement of compatibility provides the following explanation for concluding that ‘the interferences with the right to privacy ... are proportionate to the need to protect against corruption in law enforcement’:

[These measures will] increase the collection and use of personal information within Customs and Border Protection’s workplace, such as: results from mandatory drug and alcohol testing, mandatory disclosure of personal information, the compulsory physical intervention of a person for testing purposes. These measures do not limit the obligations of Customs and Border Protection under the Privacy Act 1988 and the Information Privacy Principles in general. Customs and Border Protection will continue to adhere to the safeguards aligned to the eleven Information Privacy Principles and thereby meet the requirements of the ICCPR to ensure no unlawful interference with privacy, honour or reputation occurs.

1.29 The committee observes that the statement’s analysis of the privacy impacts of these measures is inadequate as it appears to only address the information privacy aspects of the measures.

1.30 The right to privacy in article 17 of ICCPR extends to protecting a person’s bodily integrity against compulsory procedures, such as drug testing. Human rights law does not prohibit mandatory testing but it will be necessary to show that the specific measures adopted are reasonable, necessary and proportionate to the legitimate objective of protecting against corruption as well as maintaining safety in a high-risk work environment.

1.31 Given the potentially invasive nature of drug testing, the committee proposes to ask the Minister for Home Affairs for an assessment of the compatibility of these powers with the right to privacy in article 17 of ICCPR. The assessment should include an explanation for:

- **The lack of safeguards in the bill for the conduct of testing, including the absence of controls for the types of tests that could be ordered, given that tests could reveal a range of information about the person which is unrelated to the purposes of screening.**
- **The absence of a threshold or trigger for exercising the power in section 16C. By contrast, the power in section 16B requires ‘reasonable suspicion’**

before it can be exercised, and the power in section 16D is triggered by the occurrence of particular incidents.

- The potential for the definition of a 'prohibited drug' to be overly broad and in particular the absence of any specific criteria that the CEO must consider before specifying a drug as a 'prohibited drug' under section 16H.
- Further detail on the safeguards that are applicable with regard to the use and disclosure of information collected. Adherence to the Privacy Act 1988 is not, in and of itself, a guarantee that the measures are fully consistent with the right to privacy in article 17 of ICCPR.

The committee also seeks the Minister's views on whether these measures could lead to discrimination on the basis of an actual or perceived disability, contrary to article 26 of ICCPR and article 27 of the Convention on the Rights of Persons with Disabilities.

(ii) Declaration of 'serious misconduct'

1.32 The CEO has the power to dismiss employees for serious misconduct or corruption under section 29 of the *Public Service Act 1999*. The *Fair Work Act 2009* currently applies to all dismissals of Customs staff employed under the Public Service Act and provides protection where the dismissal was harsh, unjust or unreasonable.

1.33 The explanatory memorandum states that 'the application of the Fair Work Act can impact on the ability of the CEO to quickly and decisively remove a person from the organisation. For example, review of the dismissal under the Fair Work Act may result in the person having to be reinstated'.

1.34 To address these concerns, new subsection 15A(2) gives the CEO the power to issue a written declaration if the CEO reasonably believes that the dismissed worker's conduct amounted to serious misconduct and is likely to have a damaging effect on the professional self-respect, morale or reputation of the service (subsection 15A(1)). The effect of a declaration is to preclude review of the termination of employment for unfair dismissal under the *Fair Work Act 2009*.

1.35 Item 14 of the bill defines 'serious misconduct' as 'corruption, a serious abuse of power, or a serious dereliction of duty; 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 such a Customs worker'.

1.36 The statement of compatibility provides the following appraisal of the human rights impact of these provisions:

While Article 2(3)(a) of the ICCPR is based on the premise that any person, who has their rights or freedoms violated, shall have an effective remedy, Article 2(3)(b) qualifies this right more prescriptively. Article 2(3)(b) states that the right shall be '...determined by competent judicial, administrative or legislative authorities, or by any competent authority provided for by

the legal system of the state and to develop the possibilities of judicial remedy.’ This proposed Bill does not restrict the right of a Customs and Border Protection worker seeking redress through the Administrative Decisions (Judicial Review) Act 1977. The CEO’s written declaration of serious misconduct will be a reviewable decision under this Act. Customs and Border Protection workers are therefore provided an avenue to develop the possibilities of judicial remedy to their dismissal.

Right to work and right to a fair hearing

1.37 The committee considers that these provisions raise significant rights concerns, which are inadequately addressed in the statement of compatibility. Key rights engaged by these measures include the right to work in article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to a fair hearing in article 14(1) of ICCPR. Neither of these rights is addressed in the statement.

1.38 Article 6 of ICESCR includes a guarantee not to be unfairly deprived of work and to have due process protections in relation to termination of employment. Article 14(1) of ICCPR also provides for a general fair procedures guarantee by protecting the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of rights and obligations. Employment decisions have been found to come within the scope of article 14(1) of ICCPR.

1.39 The committee proposes to ask the Minister for Home Affairs and Justice to provide an assessment of the compatibility of these provisions with the right to work in article 6 of ICESCR and the right to a fair hearing in article 14(1) of ICCPR. The assessment should address whether the measures seek to achieve a legitimate objective and have a reasonable relationship of proportionality between the means employed and the objective sought to be realised; and include information on the following matters:

- **Whether a dismissal would be subject to any alternative review on its merits; and if not, the reasons for considering that judicial review would be sufficient to remedy any flaws in the original decision-making process.**
- **Whether the requirement to provide the worker with a copy of the declaration under s 15A(6) would include information on the grounds for the declaration; and if not, what impact this might have on the effectiveness of judicial review.**
- **Whether the measures will be subject to any independent oversight, other than the requirement to report to the Minister under s15A(7).**

(iii) Orders by CEO of Customs

1.40 New section 4B gives the CEO the power to issue orders requiring workers to report serious misconduct, corrupt conduct or criminal activity engaged in or

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involving another worker where such conduct affects or is likely to affect the operations and responsibilities of Customs.

1.41 New section 4C provides that workers are not excused from providing information required by a CEO's order by reason that the provision of that information will incriminate that worker or expose them to a penalty.

1.42 Information given in response to a CEO's order is not admissible as evidence against the worker in any proceedings (s 4C(2)).

1.43 The provision of use immunity in subsection 4C(2) is subject to section 16G, which sets out the circumstances in which results from an alcohol or drug test or other information, answers or documents relevant to conducting the tests can be used. Essentially, such information is not admissible as evidence against the worker except in dismissal proceedings, proceedings under the Safety Rehabilitation and Compensation Act 1988 or proceedings in tort instituted by the worker against the Commonwealth (section 16G).

Right against self-incrimination

1.44 Article 14(3)(g) of the ICCPR protects the right to be free from self-incrimination by providing that a person may not be compelled to testify against him or herself or to confess guilt. The right to be free from self-incrimination may be subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective.

1.45 Generally, an abrogation of the right against self-incrimination is more likely to be considered permissible, where it is accompanied by both a use and derivative use immunity. Subsection 4C(2) provides only for a use immunity and does not extend to a derivative use immunity.

1.46 The statement of compatibility does not address the lack of provision for a derivative use immunity but the explanatory memorandum provides the following brief explanation:

This immunity does not extend to a derivative use immunity in these circumstances because the object of CEO's Orders referred to in subsection 4B(2) is to promote the high integrity of the Customs and Border Protection workforce by exposing and addressing conduct that does not meet this standard. This objective cannot be fully realised unless derivative use can be made of the information disclosed in compliance with the CEO's Orders.

1.47 The committee proposes to write to the Minister for Home Affairs and Justice to seek further information on the following matters before forming a view on the compatibility of these provisions with the right against self-incrimination in article 14(3)(g) of ICCPR:

- **Examples of the types of situations contemplated where the objective of the measures might be frustrated by the inclusion of a derivative use immunity.**
- **Whether consideration has been given to applying a narrower abrogation of the right against self-incrimination, for example, by retaining a derivative use immunity for evidence that could not have been obtained without compelling the person to speak, but allowing other compelled evidence (such as results of drug tests and documents) to remain admissible.**