

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Law Enforcement Integrity Legislation  
Amendment Bill 2012 [Provisions]

November 2012

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# ABBREVIATIONS

ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AUSTRAC	Australian Transaction Reports and Analysis Centre
CEO	Chief Executive Officer
controlled operations regime	Part IAB of the <i>Crimes Act 1914</i> (Cth)
Crimes Act	<i>Crimes Act 1914</i> (Cth)
Customs Administration Act	<i>Customs Administration Act 1985</i> (Cth)
Customs	Australian Customs and Border Protection Service
DAFF	Department of Agriculture, Fisheries and Forestry
Department	Attorney-General's Department
Integrity Commissioner Act	<i>Law Enforcement Integrity Commissioner Act 2006</i> (Cth)
integrity testing regime	Proposed new Part IABA of the <i>Crimes Act 1914</i> (Cth)





# **RECOMMENDATION**

## **Recommendation 1**

**2.53     The committee recommends that the Senate pass the Bill.**



# CHAPTER 1

## Introduction

1.1 On 19 September 2012, the Law Enforcement Integrity Legislation Amendment Bill 2012 (Bill) was introduced into the House of Representatives by the Minister for Justice, the Hon Jason Clare MP (Minister).<sup>1</sup> On 20 September 2012, the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 20 November 2012.<sup>2</sup> On 29 October 2012, the House of Representatives passed the Bill<sup>3</sup> and, on 30 October 2012, the Bill was introduced into the Senate.<sup>4</sup>

1.2 According to the Explanatory Memorandum (EM), the Bill introduces:

...a range of measures to increase the resistance of Commonwealth law enforcement agencies to corruption and to enhance the range of tools available to law enforcement agencies to respond to suspected corruption.<sup>5</sup>

1.3 In introducing the proposed legislation, the Minister stated:

The vast majority of Commonwealth law enforcement officers are good, honest, hardworking people. But it is an unfortunate fact that criminals target law enforcement officers. Organised crime groups actively target our law enforcement officers because of the nature of the work that they do—and because of their access to sensitive information...There is no place for corruption in the public sector.<sup>6</sup>

## Overview of the Bill

1.4 To achieve its intended objectives, the Bill contains three key measures:

- introduction of targeted integrity testing for staff members of the Australian Federal Police (AFP), the Australian Crime Commission (ACC), and the Australian Customs and Border Protection Service (Customs);
- extension of the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI), to include the Australian Transaction Reports and Analysis Centre, CrimTrac, and prescribed staff of the Department of Agriculture, Fisheries and Forestry; and

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1 House of Representatives, *Votes and Proceedings*, No. 134-19 September 2012, p. 1822.

2 *Journals of the Senate*, No. 114-20 September 2012, pp 3043-3044.

3 House of Representatives, *Votes and Proceedings*, No. 139-29 October 2012, p. 1905.

4 *Journals of the Senate*, No. 119-30 October 2012, p. 3191.

5 Explanatory Memorandum (EM), p. 1.

6 The Hon Jason Clare MP, Minister for Justice, *House of Representatives Hansard*, 19 September 2012, p. 11178. For similar comments, also see: the Hon Jason Clare MP, Minister for Justice, 'You don't have anything to fear if you don't have anything to hide', *Daily Telegraph*, 28 September 2012.

- enhancement of the powers of the Chief Executive Officer (CEO) of Customs, to deal with suspected cases of corrupt conduct, and to align those powers with the powers currently available to the AFP Commissioner and the CEO of the ACC.<sup>7</sup>

1.5 The Financial Impact Statement in the EM advises that two of the proposed key measures – the introduction of targeted integrity testing and the enhancement of the CEO of Customs' powers – will have no financial impact; however, to support its expanded jurisdiction, ACLEI will be provided with additional funding of \$1.5 million over two years (2013-2014 and 2014-2015).<sup>8</sup>

### **Key provisions of the Bill**

1.6 Submitters and witnesses to the inquiry raised concerns in relation to Part 1 of Schedule 1 of the Bill (introduction of targeted integrity testing) and Schedule 2 of the Bill (enhancement of the powers of the CEO of Customs). The committee's report therefore describes and considers only those proposed provisions. The EM sets out the provisions of the Bill in detail.

#### ***Introduction of targeted integrity testing***

1.7 As the EM explains:

[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. For example, a test may involve the insertion of false information into a database to test whether an official, acting corruptly, may seek to unlawfully disclose that information to organised crime figures.<sup>9</sup>

1.8 Part 1 of Schedule 1 of the Bill is intended to give effect to recommendations made by the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity,<sup>10</sup> by amending the *Crimes Act 1914* (Cth) (Crimes Act).<sup>11</sup> The proposed amendments include the insertion of proposed new Part IABA—Integrity testing into the Crimes Act (integrity testing regime), to introduce an integrity testing regime for the AFP, the ACC, and Customs.

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7 EM, p. 1.

8 EM, p. 1.

9 EM, p. 10.

10 *Inquiry into Integrity Testing*, November 2011, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=aclei\\_ctt/e/completed\\_inquiries/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=aclei_ctt/e/completed_inquiries/index.htm) (accessed 21 September 2012).

11 EM, p. 10.

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***Enhancement of the powers of the CEO of Customs***

1.9 Schedule 2 of the Bill amends the *Customs Administration Act 1985* (Cth), to introduce a range of measures to increase the corruption resilience of Customs.<sup>12</sup> These measures include enhanced powers for the CEO to make orders, including in respect of mandatory reporting, and the ability for authorised officers to require or direct drug and alcohol testing of Customs workers.

**Conduct of the inquiry**

1.10 The committee advertised the inquiry in *The Australian* on 26 September 2012. Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at [www.aph.gov.au/senate/legalcon](http://www.aph.gov.au/senate/legalcon). The committee also wrote to a number of organisations and individuals, inviting submissions by 12 October 2012. Submissions continued to be accepted after that date.

1.11 The committee received 11 submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

1.12 The committee held a public hearing on 1 November 2012 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

**Acknowledgement**

1.13 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

**Note on references**

1.14 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

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12 EM, p. 45.



# CHAPTER 2

## Key issues

2.1 Those agencies affected by the measures contained in the Bill, and which made submissions to the inquiry, expressed strong support for the proposed legislation.<sup>1</sup> For example, the Australian Commission for Law Enforcement Integrity (ACLEI) considered:

...the new arrangements [introduced in the Bill] to be timely and appropriate measures that are matched to current and emerging changes in the organised crime threat picture and, accordingly, to law enforcement corruption risk.<sup>2</sup>

2.2 Liberty Victoria and the Crime and Misconduct Commission Queensland also supported the Bill. In Liberty Victoria's view, the Bill 'sensibly' balances an individual's right to privacy with appropriate limitations on undue interference.<sup>3</sup>

2.3 Three submitters – Civil Liberties Australia (CLA), the Community and Public Sector Union (CPSU) and the Australian Federal Police Association (AFPA) – raised specific concerns in relation to the proposed measures in Part 1 of Schedule 1 of the Bill (introduction of targeted integrity testing), and Schedule 2 of the Bill (enhancement of the powers of the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs)).

### Introduction of targeted integrity testing

2.4 ACLEI submitted that Part 1 of Schedule 1 of the Bill reflects and responds to the challenges involved in investigating corrupt conduct, while ensuring accountability, protecting the rights and reputations of individuals, and providing appropriate legal protection for officers who conduct integrity testing operations.<sup>4</sup> Customs and the Australian Crime Commission (ACC) agreed that targeted integrity testing would enhance and strengthen their existing integrity measures, with both agencies emphasising that the tests will be 'intelligence-led'.<sup>5</sup>

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1 Australian Crime Commission (ACC), *Submission 2*, p. 4; CrimTrac, *Submission 3*, p. 1; Department of Agriculture, Fisheries and Forestry, *Submission 6*, p. 4; Australian Commission for Law Enforcement Integrity (ACLEI), *Submission 7*, p. 4; Australian Customs and Border Protection Service (Customs), *Submission 10*, pp 6 and 17.

2 *Submission 7*, p. 4.

3 *Submission 8*, p. 1. Also see Crime and Misconduct Commission Queensland, *Submission 9*, p. 1.

4 *Submission 7*, p. 7. Also see Liberty Victoria, which described a system of integrity testing as a reasonable mechanism: *Submission 8*, p. 1.

5 *Submission 10*, p. 7 and *Submission 2*, pp 1-2, respectively.

### ***Annual reporting to Parliament***

2.5 The AFPA acknowledged the importance of maintaining the integrity of the Australian Federal Police (AFP), but noted that AFP employees are already subject to an existing AFP integrity regime.<sup>6</sup> In this context, and in view of the ACLEI's current oversight of the AFP in relation to corruption issues, the AFPA questioned whether Part 1 of Schedule 1 of the Bill serves a legitimate objective:

[T]he 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 [International Covenant on Civil and Political Rights]...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* (Cth), be prepared for each ACLEI annual report, to monitor the ongoing impact of integrity testing on targets.<sup>7</sup>

2.6 Mr Rogan McMahon-Hogan from the AFPA indicated that this recommendation could provide a starting point for protecting the rights of AFP employees.<sup>8</sup> However, a representative from the Attorney-General's Department (Department) informed the committee that the annual reporting of integrity testing operations, and their impact on individual officers, raises several other concerns:

We would have a concern that that might, firstly, disclose methodology that is used in the integrity testing potentially. Depending on the level of information, it might be possible to identify targeting or even particular targets.

Also...even disclosure of things like the number of integrity tests could potentially undermine deterrence value, if it is clear to officers about the number of those tests that are being conducted each year—they may be able to better gauge whether they would be subject to one, and we think the fact that officers are not aware of that will ensure that the regime has an overall greater deterrence value for corruption.<sup>9</sup>

### ***Concurrent operation of integrity regimes***

2.7 Part V (Professional standards and AFP conduct and practice issues) of the *Australian Federal Police Act 1979* (Cth) sets out a professional standards integrity regime for AFP employees. The AFPA submitted that the Bill does not adequately consider the concurrent operation of the existing regime and the proposed regime:

[N]or does [the Bill] provide grounds on which a referral of [an investigation under the existing regime] containing multiple potential elements of corruption will be warranted. It is a realistic assumption that

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6 *Submission 5*, p. 5.

7 *Submission 5*, p. 6.

8 *Committee Hansard*, 1 November 2012, p. 5.

9 Ms Sarah Chidgey, Attorney-General's Department (AGD), *Committee Hansard*, 1 November 2012, p. 8.



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.<sup>10</sup>

2.8 The AFPA recommended that the Bill explicitly provide that any behaviour, which is the subject of an AFP Professional Standards investigation, cannot also be the subject of an integrity testing operation.<sup>11</sup> The Department rejected this proposition on the grounds that it would not be appropriate:

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.<sup>12</sup>

2.9 The Department also referred to proposed new section 15JE of the *Crimes Act 1914* (Cth) (Crimes Act) (item 29 of Schedule 1 of the Bill), which allows the Integrity Commissioner to authorise an integrity testing authority for staff members of the AFP in relation to corruption issues:

While the Integrity Commissioner often works in collaboration with the AFP, it is an important aspect of the role [of] 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.<sup>13</sup>

### ***Role of the Integrity Commissioner***

2.10 In relation to integrity testing authorities, the AFPA argued that the Integrity Commissioner should have greater involvement in the approval of an authority.

2.11 The AFPA submitted that the circumstances in which an application can be made for an integrity testing authority do not appear to be transparent (proposed new subsection 15JE(1) of the Crimes Act; item 29 of Schedule 1 of the Bill):

As it stands[,] there is no external oversight of the authorisation to conduct investigations. Unfortunately, this would leave the possibility of non-integrity, organisational factors influencing decisions on whether or not to conduct an integrity test.<sup>14</sup>

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10 *Submission 5*, p. 7.

11 *Submission 5*, p. 7.

12 *Submission 11*, p. 4.

13 *Submission 11*, p. 4.

14 *Supplementary Submission 5*, p. 1.

2.12 In its supplementary submission, the AFPA stated that 'it is most appropriate for the Integrity Commissioner to authorise these investigations'.<sup>15</sup> Alternatively, the AFPA proposed that the Integrity Commissioner be notified of and oversee the authorisation of integrity testing operations, a function described in evidence as 'dual authorisation':

[The AFPA] would like to see dual authorisation with the ACLEI commissioner to authorise an investigation whether it is or is not corruption integrity testing...[I]t is an anticorruption measure in itself to ensure that there is an independent person authorising the testing and that it is not done internally...The danger with this model, as it is written at the moment, is that a senior officer who is corrupt could organise integrity testing on an innocent police officer.<sup>16</sup>

#### *Departmental and Customs' responses*

2.13 At the public hearing, a departmental officer pointed to proposed new sections 15JI and 15JK of the Crimes Act (item 29 of Schedule 1 of the Bill), which require the Integrity Commissioner to be notified of the grant or variation of an integrity testing authority, and also the oversight role of the Integrity Commissioner in relation to corruption issues under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (Integrity Commissioner Act):

[T]here is already a very extensive and sufficient level of oversight by the Integrity Commissioner of integrity testing.

In addition to that, the use of any covert or coercive powers as part of an integrity test still need to go through all of the existing authorisation processes—say, for controlled operations, or to a judge for a surveillance device warrant et cetera. So there is independent oversight in that respect of a number of the coercive powers that could be used as part of an integrity [test].<sup>17</sup>

2.14 The officer added that existing integrity measures prevent senior officers in agencies under ACLEI's jurisdiction from abusing the power granted under proposed new subsection 15JE(1) of the Crimes Act:

[O]fficers can make complaints to agencies like the Ombudsman or indeed an officer could complain to the Integrity Commissioner if they felt that they were being inappropriately targeted or corruptly targeted with an integrity test. So there is a whole surrounding set of misconduct procedures

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15 *Supplementary Submission 5*, p. 1.

16 Mr Jon Hunt-Sharman, AFPA, *Committee Hansard*, 1 November 2012, p. 7.

17 Ms Sarah Chidgey, AGD, *Committee Hansard*, 1 November 2012, p. 9.

and safeguards that would apply, as they would apply to authorising a range of investigation techniques.<sup>18</sup>

2.15 In its submission, Customs addressed the issue of how it will ensure that the measure proposed in Part 1 of Schedule 1 of the Bill is used only to enhance integrity and combat corruption. In particular, Customs highlighted proposed statutory safeguards within the Bill:

- the prerequisite criteria for the authorisation of an integrity testing operation (proposed new paragraph 15JG(2)(a) of the Crimes Act; item 29 of Schedule 1 of the Bill);
- the limited number of senior officers who will be able to authorise an integrity testing authority (proposed new section 15JE of the Crimes Act; item 29 of Schedule 1 of the Bill);
- the criminalisation of unauthorised disclosure of information relating to an integrity testing operation (proposed new sections 15JQ and 15JR of the Crimes Act; item 29 of Schedule 1 of the Bill); and
- the new notification and reporting requirements (proposed new sections 15JI and 15JS of the Crimes Act; item 29 of Schedule 1 of the Bill).<sup>19</sup>

### **Enhancement of the powers of the Chief Executive Officer of Customs**

2.16 Schedule 2 of the Bill amends the *Customs Administration Act 1985* (Cth) (Customs Administration Act) to introduce a range of measures, including enhanced powers for the CEO of Customs, and the ability for authorised officers to require or direct drug and alcohol testing of Customs workers.

2.17 ACLEI supported enhancing Customs' integrity arrangements,<sup>20</sup> and noted that the proposed provisions reflect many priority areas identified in an internal review of Customs' integrity arrangements and anti-corruption strategies, which was jointly conducted by ACLEI and Customs in 2012:

These measures will bring [Customs'] anti-corruption arrangements into closer alignment with those of the Australian Crime Commission and the Australian Federal Police, and contribute to the 'common integrity platform' which has the [Integrity Commissioner Act at] its centre.<sup>21</sup>

2.18 In its submission and at the public hearing, the CPSU raised several concerns with the proposed measure(s).

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18 Ms Sarah Chidgey, AGD, *Committee Hansard*, 1 November 2012, p. 9. Most integrity tests will involve a corruption issue: see Ms Sarah Chidgey, AGD, *Committee Hansard*, 1 November 2012, p. 10. For that reason, the senior officer concerned would already be known to the Integrity Commissioner due to notification requirements under the *Law Enforcement Integrity Commissioner Act 2006* (Cth): see Mr Michael Pezzullo, Customs, *Committee Hansard*, 1 November 2012, p. 10.

19 *Submission 10*, pp 13-14.

20 *Submission 7*, p. 8.

21 *Submission 7*, p. 9.

***Mandatory reporting pursuant to CEO's Orders***

2.19 Proposed new section 4B of the Customs Administration Act (item 16 of Schedule 2 of the Bill) provides the CEO of Customs with the power to issue written orders in relation to the control of Customs (CEO's Orders), including the mandatory reporting of certain matters set out in proposed new subsection 4B(2) of the Act.

2.20 Ms Brooke Muscat-Bentley from the CPSU told the committee:

[Our] [m]embers understand that they would need to report criminal or corrupt activity but are concerned that misconduct is quite broad and, because the CEO can determine that or change what misconduct is, they might not be aware of that misconduct and therefore could be subject to a code of conduct themselves. They are also not really clear about who they would be reporting that misconduct to and what protections would be put in place if they were reporting misconduct of a senior employee.<sup>22</sup>

2.21 The CPSU suggested that the definition of 'serious misconduct' (item 14 of Schedule 2 of the Bill) should be limited to corrupt and criminal behaviour.<sup>23</sup>

***Departmental and Customs' responses***

2.22 Noting that the Bill does not require mandatory reporting, the Department submitted that, in the event an order is made under proposed new subsection 4B(2) of the Customs Administration Act:

Any such order will make clear the person or persons to whom a [Customs] officer is required to make the disclosure, and the nature of information that is required to be disclosed.<sup>24</sup>

2.23 Customs also advised its intention to establish an Integrity Support and Referral Network, to provide advice and support to Customs staff regarding integrity and mandatory reporting obligations:

Such a facility will be critical if mandatory reporting of misconduct and corruption is introduced, as it provides a fair and confidential mechanism for staff to meet their reporting obligations. A similar program has been successfully run within the AFP for 16 years.<sup>25</sup>

2.24 The Department did not consider that it would be helpful for an order under proposed new subsection 4B(2) to cover only criminal or corrupt conduct:

[S]uch a limitation would not be of assistance in enabling Customs workers to know that misconduct should be reported as it would require Customs

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22 *Committee Hansard*, 1 November 2012, p. 3.

23 *Submission 1*, p. 6.

24 *Submission 11*, p. 5.

25 *Submission 10*, p. 12. ACLEI also confirmed that it will work with Customs to develop the professional reporting support network: *Submission 7*, p. 10.

workers to make an assessment of whether observed misconduct amounts to corruption or criminal activity.<sup>26</sup>

### ***Enhanced power to make a declaration***

2.25 Proposed new section 15A of the Customs Administration Act provides that the CEO of Customs may make a declaration that he or she believes, on reasonable grounds, that a staff member's conduct or behaviour, or any part of it, amounts to serious misconduct by the staff member (the declaration making power).<sup>27</sup> The effect of the declaration will be to exclude the application of certain provisions of the *Fair Work Act 2009* (Cth) (proposed new subsection 15A(3) of the Act).

2.26 ACLEI supported the proposed declaration-making power on the ground that it will provide 'a specific legislative basis for the [CEO of Customs] to disrupt corruption...when serious misconduct or corrupt conduct is established to a relevant level of satisfaction'.<sup>28</sup>

2.27 However, the CPSU strongly objected to proposed new subsection 15A(3) of the Customs Administration Act:

[It] will see Customs officers stripped of their right to unfair dismissal protections where the employee is terminated for serious misconduct and where the Customs CEO issues a certificate which has the effect of removing that right. This is quite an extraordinary power[.]<sup>29</sup>

### ***CPSU's key concerns***

2.28 Ms Rebecca Fawcett from the CPSU identified four key concerns with proposed new subsection 15A(3):

[First], if a Customs employee is terminated in this way, they will have no recourse to Fair Work Australia to challenge an incorrect decision. That is a basic workplace right that is enjoyed by every other Australian worker[.]

[Second], these measures would strip employees of their basic right to procedural fairness. The employee will have no right to answer allegations or respond before they are terminated. [CPSU considers] that to be at odds with our international obligations, namely the [International Labour Organisation] Termination of Employment Convention[.]

[Third], if passed, the Commonwealth will be the only jurisdiction in the land to remove these basic rights from its law enforcement and national security employees in this way. All of the state and territory jurisdictions give the agency head of their police forces the right or ability to dismiss employees for loss of confidence or serious misconduct, but all of the other jurisdictions maintain an appeal mechanism of some kind[.]

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26 *Submission 11*, pp 5-6.

27 Item 19 of Schedule 2 of the Bill.

28 *Submission 7*, p. 9.

29 Ms Rebecca Fawcett, Community and Public Sector Union, *Committee Hansard*, 1 November 2012, p. 2.

[Fourth], [CPSU believes] this power will lead to poor decision making and in the worst cases would be open to abuse. It will allow the Customs CEO to terminate the employment of a Customs officer with no real oversight.<sup>30</sup>

2.29 The CPSU advocated the removal of proposed new section 15A from the Bill or, in the alternative, that the employee protections within Schedule 2 of the Bill be enhanced by, for example:

- allowing the CEO of Customs to stand down an employee accused of serious misconduct pending investigation into the matter;
- creating a process for external review of a declaration made under proposed new subsection 15A(2); and
- including procedural requirements in proposed new section 15A – such as, that the CEO of Customs can only issue a declaration on advice of a panel that includes at least one member who is independent of Customs.<sup>31</sup>

#### *Government responses*

2.30 The EM to the Bill states that proposed new section 15A of the Customs Administration Act applies only when a staff member's employment has been terminated in accordance with section 29 of the *Public Service Act 1999* (Cth).<sup>32</sup> In its submission, the Department emphasised:

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] 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.<sup>33</sup>

2.31 In correspondence to the Parliamentary Joint Committee on Human Rights, the Minister explained in some detail how the dismissal process is to be extended to accommodate the proposed power in new subsection 15A:

It is anticipated that the agency's procedures will be amended to provide that where a sanction delegate is considering termination of employment as a sanction for misconduct, the delegate will also be required to consider whether or not the matter is one for which it may be appropriate for the CEO to consider a declaration of serious misconduct if the delegate does terminate employment. If [so]...the procedures will require that the delegate indicate this to the employee as part of the correspondence that goes to the employee from the delegate asking the employee to 'show cause' as to why his or her employment should not be terminated.

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30 *Committee Hansard*, 1 November 2012, p. 2.

31 *Submission 1*, pp 6-7.

32 EM, p. 52. Also see the end note to proposed new section 15A of the *Customs Administration Act 1985* (Cth).

33 *Submission 11*, p. 5. For similar comments, see Mr Michael Pezzullo, Customs, *Committee Hansard*, 1 November 2012, p. 10.

...

[T]his correspondence would outline the reasons why, in the delegate's view, if the sanction of dismissal is imposed that dismissal would warrant a referral to the CEO for consideration of a declaration of misconduct. This ensures that, in responding to the 'show cause' letter, the employee understand not only the implication of the potential sanction but also understands that the delegate considers that the case may satisfy the criteria for the making of a declaration of serious misconduct such that the employee can address that issue as well as providing any mitigating information going to why dismissal is not an appropriate sanction in the circumstances.<sup>34</sup>

2.32 Customs also noted that the Bill does not affect Customs' obligations under the *Public Service Act 1999* (Cth) to accord its employees fair process when investigating allegations of serious misconduct. Further:

The making of a declaration of serious misconduct will not limit other legal avenues available to a dismissed employee, such as claims under anti-discrimination legislation and under Part 3-1 of the [*Fair Work Act 2009* (Cth)] (adverse action). As a decision to dismiss a [Customs] employee is a decision made under an enactment, the possibility of review in accordance with the *Administrative Decisions (Judicial Review) Act 1977* (Cth) continues.<sup>35</sup>

2.33 In response to the CPSU's concerns regarding procedural requirements, Customs confirmed that, as indicated by the Minister in his second reading speech,<sup>36</sup> the agency will implement a panel independent of its CEO:

The role of the panel is to advise the CEO, on each occasion [the use of the declaration making power is being considered], whether or not a written declaration of serious misconduct is appropriate, given the details of [the] particular dismissal, the legislative criteria and the connection necessary to the agency's law enforcement functions.<sup>37</sup>

2.34 Two further safeguards were noted by Customs in its submission: the scrutiny of the use of the declaration making power by way of a report to the Minister (proposed new subsection 15A(7) of the Customs Administration Act); and the requirement for a copy of the declaration to be provided to the staff member (proposed new subsection 15A(6) of the Act).

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34 Parliamentary Joint Committee on Human Rights (PJC-HR), *Sixth Report of 2012: Bills introduced 9-11 October 2012; Legislative Instruments registered with the Federal Register of Legislative Instruments 20 September-16 October 2012*, October 2012, Appendix 1, letter from the Minister for Home Affairs and Justice, the Hon Jason Clare MP dated 29 October 2012, p. 7.

35 *Submission 10*, pp 15-16. For similar comments, also see EM, pp 6-7.

36 The Hon Jason Clare MP, Minister for Justice, *House of Representatives Hansard*, 19 September 2012, p. 11181.

37 *Submission 10*, p. 15.

2.35 In correspondence to the Senate Standing Committee for the Scrutiny of Bills, the Minister noted further that proposed new subsection 15A(1) of the Customs Administration Act contains more than one criterion, of which the CEO must be satisfied in order to make a declaration of serious misconduct:

[W]hether the conduct amounts to 'serious misconduct' is only one aspect of the criteria...The other aspect is that the employee's behaviour must be having, or is likely to have, a damaging effect on:

(i) the professional self-respect or morale of some or all of the members of the staff of the agency, or

(ii) the reputation of the agency 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 under section 16 of the [Customs Administration Act].<sup>38</sup>

2.36 The Minister added:

[T]he explanatory memorandum indicates that the conduct concerned must also 'relate to [Customs'] law enforcement powers'. The need for a nexus between the conduct and the agency's law enforcement functions is consistent with the policy objective behind this power. This objective is to ensure that employees of the agency who are proven to have engaged in conduct of the necessary character, relating as it does to the agency's law enforcement role, cannot be reinstated to employment within the agency, thereby compromising the work of the agency, ongoing investigations and adversely impacting on the morale of staff.<sup>39</sup>

2.37 The Department clarified further:

[T]he statement in the Explanatory Memorandum exists to provide context around the situations in which it may be used. Including an express limitation in the Bill would not be desirable as it could encourage technical challenges to the exercise of the power based on the definition of a law enforcement function. It is important that the power be able to be used in all necessary circumstances.<sup>40</sup>

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38 Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), *Thirteenth Report of 2012*, 31 October 2012, letter from the Minister for Home Affairs and Justice, the Hon Jason Clare MP dated 29 October 2012, pp 2-3.

39 Scrutiny of Bills Committee, *Thirteenth Report of 2012*, 31 October 2012, letter from the Minister for Home Affairs and Justice, the Hon Jason Clare MP dated 29 October 2012, p. 3. Also see: EM, p. 51.

40 Answer to question on notice, received 7 November 2012, p. 3.



### ***Drug and alcohol testing***

2.38 Item 21 of Schedule 2 of the Bill inserts proposed new sections 16B-16G into the Customs Administration Act, to create a new regime under which Customs workers can be required or directed to undergo drug and alcohol testing.

2.39 ACLEI supported the proposed measure:

The use by an employee of illicit drugs (including border controlled substances, such as steroids) would bring him or her into contact with criminals who supply or distribute these substances. An employee who uses unlawful or illegally-imported substances is compromised by the action and any witnesses to it, and is therefore vulnerable to corrupt influence. Accordingly, broad-based drug testing of employees is an important corruption deterrence and risk-awareness measure.<sup>41</sup>

2.40 Customs informed the committee that, apart from testing conducted by the Civil Aviation Safety Authority (which applies to Customs staff working at airports), the agency does not have the power to determine whether a worker is under the influence of illicit drugs or alcohol. Customs therefore supported the proposed drug and alcohol testing regime, emphasising that the legislative amendments will ensure high standards of integrity, health, and safety, as well as allow for the protection of Australia's border.<sup>42</sup>

2.41 In addition, Customs noted that the agency is developing a comprehensive Drug and Alcohol Management Program, to underpin the proposed regime. Some features of the program include:

- development of a dedicated education and awareness process;
- development of a robust sampling methodology;
- intelligence-led, risk-based identification of employees for drug and alcohol testing; and
- creation of a drug and alcohol response program.<sup>43</sup>

2.42 The Minister advised the Parliamentary Joint Committee on Human Rights that Customs' program will implement current best practice to meet Australian standards, and these standards will be reflected in a number of anticipated arrangements.<sup>44</sup>

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41 *Submission 7*, p. 9.

42 *Submission 10*, p. 9.

43 *Submission 10*, p. 14.

44 PJC-HR, *Sixth Report of 2012: Bills introduced 9-11 October 2012; Legislative Instruments registered with the Federal Register of Legislative Instruments 20 September-16 October 2012*, October 2012, Appendix 1, letter from the Minister for Home Affairs and Justice, the Hon Jason Clare MP dated 29 October 2012, pp 3-4.

*CPSU concerns*

2.43 In principle, the CPSU did not object to the proposed drug and alcohol testing regime; however, Ms Muscat-Bentley stated:

[Our members have] some concerns based on a series of unknowns, primarily what safeguards will be in place to ensure [that] the privacy of employees will be maintained, particularly around the use of prescription medication.<sup>45</sup>

2.44 The CPSU argued that the circumstances in which drug and alcohol testing will be permitted 'go beyond the stated purposes of the Bill and the [behaviour] 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] to deal with suspected corrupt conduct'. However, the proposed sections 16B-16H of the Customs [Administration] 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.<sup>46</sup>

2.45 While the CPSU considered the intention of the proposed regime to be sound, its submission stated that the regime would be open to abuse, and wider implementation of 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.<sup>47</sup>

2.46 In this context, the CPSU particularly identified the capture of prescription medication within the definition of 'prohibited drug' as a concern:

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.<sup>48</sup>

2.47 The CPSU called for the proposed legislation to be as specific as possible in setting out the range of situations in which alcohol and drug testing is permitted, and

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45 *Committee Hansard*, 1 November 2012, p. 2.

46 *Submission 1*, p. 2.

47 *Submission 1*, p. 2.

48 *Submission 1*, p. 2.

how the results of that testing can be used. Its submission especially recommended that prescription medications should be excluded from the Bill.<sup>49</sup>

2.48 At the public hearing, Ms Fawcett from the CPSU stated that, alternatively, the Bill needs more safeguards, to ensure that Customs staff who are legitimately using prescription medication, with a prescription, 'do not suffer any kind of adverse action in their employment because they had a medical condition'.<sup>50</sup>

### *Government responses*

2.49 The Department submitted that proposed new section 16C of the Customs Administration Act, which allows an authorised officer to direct a Customs worker to undergo drug and/or alcohol testing at any time and without reason, is intended to provide for mandatory random testing of Customs workers:

The ability to have a randomised approach is essential to ensure that [Customs] remains drug and alcohol free. The powers to authorise testing under [proposed new] sections 16B and 16D only allow for testing after an incident or allegation has occurred. Section 16C will allow [Customs] to proactively manage potential integrity issues, strengthening integrity in the agency.<sup>51</sup>

2.50 In relation to the breadth of the definition of 'prohibited drug', the Minister has stated that 'it is not always appropriate to be overly prescriptive in primary legislation', and in the context of the Bill:

[T]he benefits of providing a definition are outweighed by the risks arising from [the] evolving and changing nature of the drug environment...[N]ew drugs and their variants are continually entering the market...[P]roviding a definition of 'prohibited drug' will confine the ability of [Customs] to meet the challenges presented by new drugs and will undermine the ability of the agency to maintain a drug free workplace. Defining the term 'prohibited drug' by legislative instrument will provide a lawful and flexible mechanism to allow the CEO of [Customs] to respond quickly to this ever-changing environment.<sup>52</sup>

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49 *Submission 1*, pp 2-3.

50 *Committee Hansard*, 1 November 2012, p. 4.

51 *Submission 11*, p. 5. Also see PJC-HR, *Sixth Report of 2012: Bills introduced 9-11 October 2012; Legislative Instruments registered with the Federal Register of Legislative Instruments 20 September-16 October 2012*, October 2012, Appendix 1, letter from the Minister for Home Affairs and Justice, the Hon Jason Clare MP dated 29 October 2012, p. 4.

52 PJC-HR, *Sixth Report of 2012: Bills introduced 9-11 October 2012; Legislative Instruments registered with the Federal Register of Legislative Instruments 20 September-16 October 2012*, October 2012, Appendix 1, letter from the Minister for Home Affairs and Justice, the Hon Jason Clare MP dated 29 October 2012, pp 4-5.

2.51 Responding to the CPSU's comments regarding prescription medications, the Acting CEO of Customs, Mr Michael Pezzullo, commented:

If our officers are engaging in the abuse of illicit drugs, the abuse of what might otherwise be prescribed medication in that they are using it beyond clinical norms and not through prescriptions or turning up to work boozed up, that is not in keeping with the sorts of standards that we believe our agency should be projecting to the Australian community at large.<sup>53</sup>

### **Committee view**

2.52 The committee notes the objectives of the Bill, and that most participants in the inquiry supported the proposed measures. While certain aspects of proposed provisions in Part 1 of Schedule 1 of the Bill (introduction of targeted integrity testing) and Schedule 2 of the Bill (enhancement of the powers of the CEO of Customs) concerned some submitters and witnesses, the committee is of the view that the response received from the Department adequately explains and supports the measures, which are designed to prevent corruption in Commonwealth law enforcement agencies and enhance the ability of those agency heads to respond to cases of suspected corruption. The committee also notes the statutory protections and level of oversight provided for throughout the Bill, as well as in existing legislation (such as the *Law Enforcement Integrity Commissioner Act 2006* (Cth)).

### **Recommendation 1**

**2.53 The committee recommends that the Senate pass the Bill.**

**Senator Trish Crossin**

**Chair**

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53 *Committee Hansard*, 1 November 2012, p. 13.

# **APPENDIX 1**

## **SUBMISSIONS RECEIVED**

<b>Submission Number</b>	<b>Submitter</b>
1	Community and Public Sector Union
2	Australian Crime Commission
3	CrimTrac
4	Civil Liberties Australia
5	Australian Federal Police Association
6	Department of Agriculture, Fisheries and Forestry
7	Australian Commission for Law Enforcement Integrity
8	Liberty Victoria
9	Crime and Misconduct Commission Queensland
10	Australian Customs and Border Protection Service
11	Attorney-General's Department

## **ADDITIONAL INFORMATION RECEIVED**

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|---|---|
| 1 | Joint response to questions on notice provided by the Australian Customs and Border Protection Service and the Attorney-General's Department on 7 November 2012 |
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## **APPENDIX 2**

### **WITNESSES WHO APPEARED BEFORE THE COMMITTEE**

**Canberra, 1 November 2012**

BAKER-GOLDSMITH, Ms Sarah, Principal Lawyer, Australian Commission for Law Enforcement Integrity

CHIDGEY, Ms Sarah, Assistant Secretary, Attorney-General's Department

CORNALL, Mr Robert AO, Acting Integrity Commissioner, Australian Commission for Law Enforcement Integrity

FAWCETT, Ms Rebecca, Acting Deputy Secretary, Community and Public Sector Union

HAYWARD, Mr Stephen, Executive Director Operations, Australian Commission for Law Enforcement Integrity

HUNT-SHARMAN, Mr Jon, President, Australian Federal Police Association

McMAHON-HOGAN, Mr Rogan, Senior Legal Officer, Australian Federal Police Association

MUSCAT-BENTLEY, Ms Brooke, Lead Organiser, Community and Public Sector Union

PEZZULLO, Mr Michael, Acting Chief Executive Officer, Australian Customs and Border Protection Service

RAPMUND, Mr Cameron, Senior Legal Officer, Attorney-General's Department

SELLARS, Mr Nicholas, Acting Executive Director, Strategic and Secretariat Branch, Australian Commission for Law Enforcement Integrity