

CHAPTER 4

DESIGNING AN INTEGRITY TESTING PROGRAM

4.1 Further to its recommendation, in principle, to introduce an integrity testing program for Commonwealth law enforcement agencies, the committee has sought to draw out discussion on the ideal design of such a program in this chapter.

4.2 While the committee does not wish to be overly prescriptive in stipulating the design of an integrity testing program, there are a number of areas where the committee makes express recommendations.

Jurisdiction

4.3 The committee notes advice from the Australian Public Service Commission (APSC) that certain low-level integrity tests (i.e. those that do not require special police powers) could take place within the broader Australian Public Service (APS) under existing legislative arrangements.¹ The committee agrees with the APSC, however, that, given the resource intensity of integrity testing, the introduction of a formal integrity testing program across the APS is not warranted at this time.

4.4 The committee is instead of the view that integrity testing is a measure suited to high risk agencies, which have previously been identified as being those agencies currently under ACLEI's jurisdiction: the AFP, ACC and the Australian Customs and Border Protection Service (Customs), as well as agencies that have been previously suggested for inclusion in a second tier ACLEI jurisdiction.² The committee notes that at the time of adopting this report, the Government had not yet responded to the recommendation to create a second tier jurisdiction included in the LEIC Act inquiry.³

4.5 The committee therefore recommends that if an integrity testing capability is pursued, integrity testing programs should apply to those agencies within ACLEI's jurisdiction, as this represents the appropriate matching of measures to risk.

Recommendation 3

4.6 The committee recommends that an integrity testing program initially apply to law enforcement agencies within ACLEI's jurisdiction.

1 Australian Public Service Commission, *Submission 3*, p. 5.

2 See *Final Report, Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*.

3 See *Final Report, Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*.

Conduct of integrity tests

Who should authorise and conduct the tests?

4.7 In introducing an integrity testing program, it is important to establish who would be able to authorise a test, and which agency, or agencies, would actually conduct the operation of the test.

4.8 If integrity testing is introduced, the

4.9 AFP has expressed a desire to retain control of its own testing program (estimated cost of conducting the entire program in-house \$8m), but has also considered the outsourcing of the testing capability to another agency.⁴

4.10 ACLEI has expressed a preference for it to be given the ability to conduct an integrity test as part of its corruption investigations. It notes that, had the option been available, it would have been of use in past investigations. ACLEI's preference would be to have access to a regime conducted by someone else:

In terms of whether ACLEI would have the staff to conduct integrity testing, I doubt that we would, but I note that where integrity testing is part and parcel of the work of integrity agencies in the Commonwealth, and I think here in particular of the Corruption and Crime Commission in Western Australia and of the Police Integrity Commission in New South Wales, that they do not have separate integrity testing units; they merely use integrity testing as another method among other powers and methods they have in their investigation.⁵

4.11 The AFPA, while against integrity testing for its members, has submitted that, if it were to be introduced, it would prefer ACLEI to conduct the tests, under a system of strict parameters and accountability:

From the outset we have talked to the ACLEI commissioner, and we would want to see ACLEI have the chief responsibility of approving any sort of integrity test process, being satisfied that the integrity test itself was not a breach of the integrity of the organisation and that would mean an approval process where a degree of suspicion is satisfied. We would see ACLEI taking responsibility that the testing process is reasonable in all the circumstances, that approval of the process is appropriate. We would expect them to ask questions such as, 'How many times have you targeted Sergeant XYZ? Eight times and you still have not caught him? Is there a bigger picture here?' It would be very much a similar arrangement to a conventional search warrant or telephone intercept application. We would invest our trust in ACLEI as a separate organisation from the AFP to be able to bring that perspective and that impartiality. Of course we would expect that from time to time they do it with AFP assistance. A great deal of

4 AFP, *Submission 10*, pp 5–6.

5 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 3.

investigational expertise rests within the AFP and ACLEI obviously has a big mission and a limited amount of budgetary support. Serious corruption offences therefore should be the focus.

We do not support the notion of an in-house in-AFP idea of the AFP deciding to check Constable Joe Blow. We do not support it in the interests of both the AFP in our view and of course in the interests of our members. That is a summary of what we think on the subject.⁶

4.12 However, the Commonwealth Ombudsman expressed a preference for integrity testing that is conducted by the affected agency itself, as integrity testing by an agency on its own employees might send a message that corruption will not be tolerated, and hence instil a positive culture.

I think that there is some potential there but the very scale of the Australian Federal Police as you describe it is such that the capacity of ACLEI to have a meaningful role would be severely challenged without them having to divert significant resources from the very useful systemic work done now. I think you would need a much larger organisation to be able to do that. Secondly, and I would just go back to my point about the internal culture, it might be that initially there would be difficulty in an industrial sense, but based on the evidence as I understand it from overseas forces who do this, eventually it is the workforce itself that agrees to these regimes because they see it as a way of controlling those with a propensity to corruption and it also enables them to have a higher degree of individual integrity. It is something that then grows organically within the organisation rather than it being seen as being imposed from without.⁷

4.13 The Ombudsman notes that this benefit is lost if the testing is undertaken by an outside oversight agency. Conversely, the Ombudsman notes, testing by an external agency is likely to encourage a closing of ranks, making an oversight agency less effective. In response the AFPA stated that:

I spent many years working with AFP professional standards and now I have spent many years defending or supporting our people who are subject of professional standards investigations and in my experience of investigations of serious matters I have never seen a gram of enthusiasm lacking in the AFP investigators who are investigating complaints against those of their fellow members. As I said before, that is why we invest our confidence in an organisation, namely ACLEI. Obviously, it does not know the ins and outs of every aspect of AFP conduct and for it to be effective, if you really are concerned at serious level corruption, it is hard to see how you could proceed without some of the AFP staff involved in the investigation.⁸

6 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, pp 45-46.

7 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 19 August 2011, p. 41.

8 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, p. 48.

4.14 Other potential models include a joint model where agencies collaborate in the design and conduct of tests. Such an approach may be appropriate given the way corruption issues are handled under the LEIC Act, as indicated by the ACC:

In the first instance, if we had that suspicion, we would refer that to the Integrity Commissioner. The act requires if we suspect there is significant corruption or a breach of integrity, we would have to refer it to the ACLEI commissioner, and then he has a range of tools he could use to investigate that matter for us. If he came back and said—which I do not think he would—that he could not investigate that, and we perceived the risk to our agency to be too significant, that is the time I could see that we would want to work with them on an integrity testing regime. In the first instance, if I had that suspicion about a person, that would definitely go to the Integrity Commissioner as 'this appears to be a problem', and then they would take it from there. Mostly, if it was a serious allegation, they would deal with it. If it was a lesser threshold allegation, they do sometimes return them to us saying, 'You investigate it and tell us what you find and we will decide what to do.' Nothing would change in that, except that they might want to say to us, 'We want you to run this integrity test using controlled operations or telephone interception for this purpose' and I guess that is where you would want to be able to do it if they asked you to do it in that case.⁹

4.15 When asked if the ACC would accept the fact that there may be an occasion where ACLEI might want to conduct an integrity test without the knowledge of ACC management, the ACC noted:

Yes. I think they have that jurisdiction, and they would do it. They would make that decision based on the seriousness and the reach of the allegation. I expect that is exactly what they would do. I understand that there have been cases in the past referred to ACLEI, although not by us, and that is a matter for them to investigate and take action on. If we identified the integrity issue and forwarded it to ACLEI, the general process is that we then continue to have a dialogue about what will happen.¹⁰

4.16 The committee notes that, in order to conduct an integrity test, certain capabilities need to be used or accessed. In relation to tools needed to implement integrity testing, the committee was told that:

Integrity testing uses other powers. It is not used alone: you would use surveillance as you indicated, you would use telecommunications interception and you would use listening devices as necessary. There is a convergence of powers and measures involved in integrity testing.¹¹

Some of those tools that may be used in an integrity test are things like covert police surveillance and some of the technical aspects around that. Going to what the commissioner said, that does not need to be a part of a

9 Ms Jane Bailey, ACC, *Committee Hansard*, 19 August 2011, p. 32.

10 Ms Jane Bailey, ACC, *Committee Hansard*, 19 August 2011, p. 30.

11 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 10.

program as a standalone. I think the AFP draws out in its submission some of the requirements around covert police surveillance.¹²

4.17 The AFP supported the above views, noting the need for some additional integrity testing specific training:

Certainly we would have the majority of skills that would be required: we already operate with our surveillance officers, we have telephone interception capabilities, and we have our normal investigative and operational processes. They would all go towards this type of framework. Some more specific training would be required of officers involved in that in terms of the governance around what would be involved and the operation of legislation if that was appropriate. There would need to be some specific training for our officers in that regard.¹³

4.18 Customs advised the committee that they do not have the capability or supporting legislation to be able to conduct integrity testing:

We have got some limited investigative powers strictly related to the pursuit of infringements or breaches against the Customs Act and associated acts which gives us a degree of limited investigative powers in relation to general citizens who might be breaching the Customs Act, say, in terms of importation. Even there, where, if you like, serious investigative firepower has to be brought to bear such as warrants, listening devices and the like, we work in partnership with police forces, predominantly the Federal Police but others as well. Where relevant, we partner with the Crime Commission in the sorts of matters that Ms Bailey was referring to in her evidence. We actually start from a different starting point. We are in effect public servants and the only investigative powers we have are the general administrative inquiry powers that any public servant has pursuant to a delegation from the agency head, in our case, the CEO of the Australian Customs and Border Protection Service.¹⁴

4.19 The committee is of the view, however, that the authorisation of integrity tests should be the purview of the Integrity Commissioner and agency heads. Specifically, the committee recommends that the Integrity Commissioner be given the ability to authorise and conduct an integrity test in the course of an investigation of a corruption issue under the LEIC Act.

4.20 The committee is also of the view that heads of law enforcement agencies within ACLEI's jurisdiction should have the ability to conduct integrity tests within the agency, but would have to notify ACLEI of their intention to do so. This would be necessary to ensure a certain level of accountability, and also to avoid conflict with any investigation that ACLEI may be conducting, or considering conducting.

12 Mr Stephen Hayward, ACLEI, *Committee Hansard*, 19 August 2011, p. 3.

13 Assistant Commissioner Leanne Close, AFP, *Committee Hansard*, 19 August 2011, p. 12.

14 Mr Michael Pezzullo, Customs, *Committee Hansard*, 19 August 2011, p. 37.

Recommendation 4

4.21 The committee recommends that the Integrity Commissioner and heads of agencies under the jurisdiction of ACLEI be given the ability to authorise integrity tests in the course of their investigations into corruption issues.

4.22 The committee recognises that in giving agency heads discretion to conduct integrity tests, appropriate accountability mechanisms are also required. An accountability framework is proposed at the end of this chapter.

What type of behaviour should an integrity test target?

4.23 In terms of what sort of activity integrity testing should be applied to, the Integrity Commissioner noted:

As to the types of targeting that ACLEI has seen by organised crime of law enforcement agencies, certainly the standout is the passing of information to organised crime. ACLEI talks in terms of the corruption handshake, which is where organised crime seeks facilitation from within to assist its criminal intent and criminal activity. So that is certainly one area. Another area is inappropriate association. But as I say, in these kinds of contexts, you have hopefully, if the committee so decides and recommends, another measure to use in this situation.¹⁵

4.24 The type of behaviour targeted by an integrity testing program would also dictate, to a certain extent, whether the results of individual tests would be used for training purposes, disciplinary purposes or to found criminal charges. Depending on the aim, tests can target serious corruption or lower level behaviour that, if left unchecked, would contribute to poor ethical culture, potentially enabling corruption.

4.25 The question of what level of behaviour to target is intimately associated with the overall design of an integrity testing program, which is explored below in the section on legislative design.

15 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 3.

Targeted or random testing?

4.26 One of the key questions for the Committee during the inquiry was whether integrity testing should be targeted or random or a combination of both. The majority of submissions to the inquiry preferred targeted, rather than random, integrity testing. The random approach was seen as exacerbating the downsides of integrity testing, such as the effect on agency morale, while offering lower cost-effectiveness. For example, the Integrity Commissioner reported that, in terms of random testing:

I do not see a role for it. I see it as having many disadvantages, not countered by advantages, so from that point of view, I am looking at intelligence-led targeted integrity testing. It goes to the question of trust between the employer and the employee. It relates to the evidence already available in jurisdictions that use random integrity testing that the incidence of failure of the test is low compared to the incidence of failure when targeted integrity testing is used. You would note the Australian Federal Police Association's submission about random testing. I think there is just a general view that it adds unnecessary expense. You really want to be focused on what you are doing in terms of targeting corrupt conduct or corruption risk.¹⁶

4.27 The AFP also did not support random testing, stating:

We would prefer a targeted model to be introduced...The reason for that is that it is quite resource intensive, and we would look at these situations from an intelligence led basis. Random testing is much more generic. It is certainly an option that we have not discounted, but if such a regime is introduced, we would initially prefer the targeted approach, do some analysis of how successful that has been, do a cost-benefit analysis, and then perhaps we would look at a more random approach if that was required.¹⁷

4.28 On the basis of research reviewed by the AFP, internal deliberations and experiences to date through the Australian New Zealand Police Advisory Agency Integrity Testing Practitioners Committee, the AFP supported targeted over random integrity testing for the following reasons:

- random integrity testing has not generally promoted a professional and ethical workplace, and can have a negative impact on culture, morale and productivity;
- a targeted regime can be marketed as part of a suite of focused intervention strategies; and
- covert investigations against police are difficult as they can check databases and indices to confirm cover stories of operatives. A properly prepared test

16 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 7.

17 Assistant Commissioner Leanne Close, AFP, *Committee Hansard*, 19 August 2011, p. 12.

requires extensive work to produce a scenario capable of withstanding security, and requires operatives unknown to the target.¹⁸

4.29 AFPA were against random testing for the AFP for similar reasons, stating:

[W]e do not want to start at the lowest level of behaviour versus dealing with serious corruption. That is where we have got to target first as far as we are concerned. We do have faith in the ACLEI process. It could independently authorise targeted testing or it could utilise one jointly with the AFP, use the resources of the AFP if it wants to, it does that on other operations, or it can use other resources. Really with a limited AFP budget we would see this random integrity testing as way down the path.¹⁹

4.30 The ACC also preferred targeted testing, observing:

I think the idea that you could randomly test people may have some appeal, but I think actually for us the issue is how we better understand if there is any particular issue or person in the agency who has, through human frailty or corruption, damaged the agency and its reputation by their actions. While I would not rule it out, I just think it is probably more suitable to the size of our agency to view it for the targeted lens initially.²⁰

4.31 The Western Australia Police provided an alternative view. As Detective Superintendent Flack remarked:

My view from 31 years experience is that police officers would get over it if it were to become random. Yes, in the initial view they would beat the drum and say, 'I don't like it; it's an infringement; you don't trust us,' and the rest of it. But, at the end of the day, it will be judged on whether you are maliciously using a random test or whether it is effectively targeting, even on a random basis, those areas of highest risk.

It will certainly have a detrimental effect on the morale of an office if you do one on an office and it comes up a negative—or a positive. We find if there is a problem in there it will in the short term have an impact on morale, but there is a difference between morale and esprit de corps. Morale can change on a day-to-day basis, depending on whether you had an argument with your partner when you left in the morning. Esprit de corps is that commitment to the body, commitment to the profession, commitment to the organisation, and I suspect that would not change whether you had random or targeted tests.²¹

18 AFP, *Submission 10*, p. 5.

19 Mr Jon Hunt-Sharman, AFPA, *Committee Hansard*, 19 August 2011, p. 49.

20 Ms Jane Bailey, ACC, *Committee Hansard*, 19 August 2011, p. 27.

21 Detective Superintendent Tony Flack, Western Australia Police, *Committee Hansard*, 9 September 2011, p. 6.

4.32 The Ombudsman, while generally not in favour of integrity testing, did recognise that random testing enhanced the deterrent effect of integrity testing due to its unpredictability, stating:

I think the goal of random is so that the ability to be predicted is much more difficult. It also has the ability to reach all different parts of an organisation at different times without any risks through internal collusion that programs are exposed. It does have a role there, although I would say that the key to success in such a plan is where there is some evidence of an area of a force where there is suspect conduct or where there might be some evidence, although insufficient to bring charges or even arrange an investigation. Tests of that sort can then be much more effective.²²

4.33 As noted in chapter 2, a key difference between the two types of testing is that random testing is focused on deterring unacceptable conduct whereas targeted testing is primarily for detecting unacceptable conduct.

4.34 In practice, the line between random and targeted testing can be blurred, particularly if a group of officers or high risk area is targeted. For example, the Police Federation of Australia noted that targeted integrity tests could include scenarios such as:

For example, it might be a traffic scenario where it may be a highway patrol officer who has a more roaming brief across western Sydney, then it would be targeted, you would expect, at highway patrol officers in that area. So, it would have a targeted aspect. I am not aware of that sort of issue being one that has been subject to a test but I do still think that it would be certainly refining your search area to a small geographic location.²³

4.35 The committee recognises that the majority of witnesses and submitters to the inquiry support targeted rather than random integrity testing, and concurs that an integrity testing program should focus, in the first instance, on targeted testing. The committee notes however that the notion of targeted testing may include targeting a particular group or location where there is assessed to be a higher corruption risk, which the committee observes, may overlap with some definitions of random integrity testing. The committee further recognises that purely random integrity testing can create a significant deterrent effect and may warrant further investigation in the future.

22 Mr Allan Asher, Commonwealth Ombudsman, *Committee Hansard*, 19 August 2011, p. 41.

23 Mr Mark Burgess, PFA, *Committee Hansard*, 19 August 2011, p. 50.

Legislative framework

4.36 Under existing legislation, it is already possible to conduct certain types of integrity testing. However, the committee received evidence that, to be effective, an integrity testing regime will require specific legislative amendment.

4.37 The committee believes that introducing specific legislation or legislative amendments to support an integrity testing program may be of benefit for several reasons. These include clarifying the circumstances in which special police powers may be used to support an integrity test, stipulating the authorisation process for a test to commence and establishing a robust accountability framework.

4.38 AGD informed the committee that some legislative changes may be needed, stating:

We note that there is currently no general legislative impediment to integrity testing, although in practice integrity testing should be conducted fairly free of inducement and be subject to adequate oversight mechanisms. We consider it possible that an integrity testing regime could be implemented under existing legislation, but depending on the specific integrity testing model to be considered, some legislative changes may need to be considered by government.²⁴

4.39 Both the AFP and ACLEI are of the view that, while integrity testing could occur under current legislation, legislative amendment would be beneficial to ensure the success of the scheme. The Integrity Commissioner noted:

The legislative model should not compel anyone to use the integrity testing method but enable agency heads or the Integrity Commissioner to use it as an integrity measure in relation to their functions and responsibilities if the need arises. Ideally it should also ensure that, in respect of the LEIC Act agencies, they are required to notify the Integrity Commissioner if an integrity test is to be authorised by an agency head. This measure will ensure that the action proposed does not cut across what ACLEI may already be doing or contemplating.²⁵

4.40 ACLEI submitted that some integrity testing scenarios could presently be conducted under existing legislation, while other scenarios would not require legislation at all. It nevertheless noted that fairness issues are perhaps best addressed in legislation to put jurisdictional issues, powers and accountability arrangements beyond doubt.^{26,27}

24 Ms Sarah Chidgey, AGD, *Committee Hansard*, 19 August 2011, p. 19.

25 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 2.

26 ACLEI, *Submission 4*, p. 8.

27 ACLEI, answer to question on notice, 13 October 2011 (received on 5 November 2011).

4.41 The Integrity Commissioner also noted that:

The controlled operations framework where the same issue arises; that is, something illegal in that sense is done in the course of conducting the operation but for the indemnity given by the controlled operation legislation and in relation to the integrity test. That would be one of the reasons you would want a legislative framework. For instance, if you wanted to conduct an integrity test, you might put false information in a database so that a person who you suspect of unlawfully disclosing that information to another person would then see that information and then disclose it, and that would be a form of integrity testing. But the placing of the data in the first place, without the coverage, would be an illegal act.²⁸

4.42 The AFP noted that, while it would be possible to run integrity testing on an administrative, rather than legislative basis, in practice it would be an important safeguard to have Parliament authorise an integrity testing regime and set down the thresholds for integrity testing operations to be triggered:

We are certainly keen that the parameters and scope of what we could do on an integrity testing regime are very clear and endorsed by parliament. It gives us very clear guidance to work towards and allows us to structure our internal governance mechanisms beneath that. The question of whether or not thresholds for covert policing powers should be altered in any way to allow for integrity testing is another big set of policy issues that needs to be considered separately.²⁹

4.43 The AFPA were strongly in favour of a legislative framework:

As we also stated in our submission, the integrity testing scheme under consideration should be strictly defined in legislation so as to exclude any operation on state and territory police officers. It should also contain strict guidelines on the consequences for a state and territory police officer who is indirectly implicated in the result of testing.³⁰

4.44 The committee considers that legislation-based integrity testing would have significant advantages over a purely administratively-based regime. Endorsement of an integrity testing regime by the Parliament, through legislation, would:

- enhance public confidence that integrity testing would be carried out in a consistent, accountable and transparent manner.
- be consistent with the way in which invasive measures, such as covert policing powers and the drug and alcohol testing of AFP appointees, is dealt with; and

28 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 5.

29 Ms Elsa Sengstock, AFP, *Committee Hansard*, 19 August 2011, p. 17.

30 Mr Mark Burgess, AFPA, *Committee Hansard*, 19 August 2011, p. 45.

- avert legal challenges about the legality of tests that are conducted.³¹

4.45 The key elements of a legislative framework for targeted integrity testing, and some of the issues that would need to be considered, as raised by the AFP, are:

- the threshold test for conducting an integrity test;
- the extent of integrity testing activities;
- the authorisation process for conducting integrity tests and the level at which authorisation must occur;
- the record keeping and reporting requirements for integrity testing;
- oversight and monitoring of the integrity testing regime;
- how evidence obtained from an integrity test can be used; and
- protection for officers conducting integrity tests (ie from civil or criminal liability).

4.46 In terms of the authorisation process the AFP noted that:

In relation to the governance framework that we would envisage being in place, for us it would be very similar to the way that we manage controlled operations activities currently. It is just not a case of the officers thinking that the scenario they are going to run is a good idea. Internally within the AFP we have several steps in the process of sign off before a controlled operation is approved. The investigators put the information together, that goes through to an independent committee of superintendents and a commander, and then there is a final assistant-commissioner-level person who reviews all of that material and signs off the controlled operation. That is the sort of governance that we put in place for controlled operations. We would envisage something of a similar nature. For this type of activity, it would probably be a higher level that we would have these operations running, and obviously professional standards would have a significant role to play in that.³²

4.47 The committee is of the view that specific legislation authorising and governing the use of integrity tests is necessary and desirable.

Use of covert police powers

4.48 To be effective, and depending on the specific scenario, an integrity test may require the use of covert police powers. For example, surveillance capabilities may be used to observe the behaviour of a test subject. Telecommunications intercepts could potentially be used in some circumstances, while any test that involves committing an offence would require the authorisation of a controlled operation. This last power is particularly relevant, as most operations involving illicit substances, or the planting of

31 AFP, *Submission 10*, p. 7.

32 Assistant Commissioner Leanne Close, AFP, *Committee Hansard*, 19 August 2011, p. 17.

false information in a database (both examples of integrity testing as explained to the committee), would entail the commission of an offence. While ACLEI, the AFP and ACC are able to authorise controlled operations relating to the investigation of a corruption issue, Customs can conduct controlled operations if authorised by the AFP, ACC or ACLEI.

4.49 Police powers such as controlled operations are subject to legislative control, including thresholds that must be met before they can be used. For example, Part IAB of the *Crimes Act 1914* provides for the authorisation of controlled operations. Part IAB requires the controlled operation to be for the purpose of obtaining evidence that may lead to the prosecution for a serious Commonwealth offence or a serious state offence that has a federal aspect (including bribery or abuse of public office). Similar criteria apply to the use of telecommunication intercepts, access to records and surveillance as follows:

Table 2: thresholds for covert police powers	
Action	Justified by the need for evidence for:
Controlled operation	An offence punishable by at least three years imprisonment and involving a prescribed matter
Real time telecommunication interception	Offence punishable by at least seven years imprisonment and involving a prescribed matter
Accessing stored telecommunications	A serious contravention, including any offence punishable by at least three years imprisonment or 180 penalty units
Accessing telecommunication data/records	Can be authorised on prospective basis for offences subject to three years, and on a historical basis for enforcement of criminal law or a law imposing pecuniary penalty
Surveillance	Offences punishable by at least three years
Assumed identity	Necessary for one or more of the following purposes: <ul style="list-style-type: none"> • the investigation of, or intelligence gathering in relation to, criminal activity; • the exercise of powers and performance of functions for the National Witness Protection Program; and • the training of persons for, and the administrative support of, those purposes.

4.50 As the legislation currently stands, an integrity test could not use any of these powers or capabilities unless the specific threshold was met.

4.51 It may be that, in many cases where a law enforcement agency wished to conduct an integrity test, the seriousness of the suspected behaviour would justify the use of covert policing powers. It should be noted that most serious corruption involves an offence of a magnitude that most of the above powers could be used. A further complicating factor, however, is that in addition to the requirement of a serious offence, a certain standard of intelligence is also necessary:

When approving the use of covert policing powers, the authorising or issuing officer usually needs to be satisfied (to an objective standard) that a criminal offence has, is or will be committed. Where there is only limited intelligence indicating criminal activity, this may not be sufficient to meet the threshold test.³³

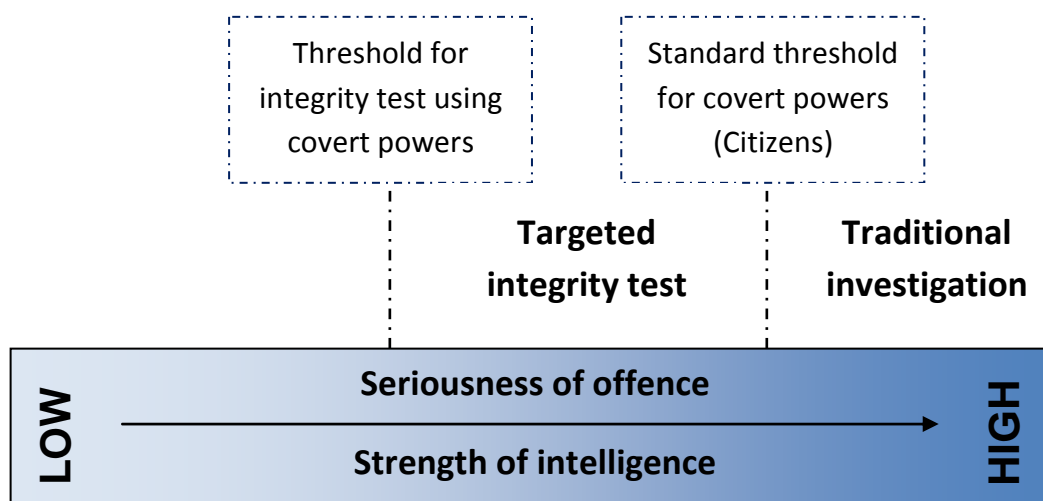
4.52 The standard of intelligence required may be a barrier to the use of covert policing powers as part of an integrity test in precisely those cases where an integrity test would be of most use; i.e. where an agency wants to test suspicions of corruption.

4.53 Given ACLEI's stated preference to use integrity testing in cases where there may not be enough evidence to proceed with traditional investigation techniques, the existing thresholds may mean that effective integrity tests using covert powers cannot be used. Likewise, an agency such as the AFP or ACC that wanted to test an officer who was subject to a pattern of complaints, or certain allegations, may or may not be able to conduct a useful integrity test for the same reason, depending on the nature of the suspicion.

4.54 The lowering of covert policing power thresholds for the purpose of integrity testing is a serious matter, given the intrusiveness of the powers. It should be noted, however, that the subject of these tests would not be the average citizen, for whom thresholds are currently crafted. Law enforcement officers, and other employees of law enforcement agencies occupy positions of trust. The importance of their position, the corruption risks inherent in the role, and the difficulties posed in 'investigating the investigators', justifies, in the committee's opinion, the lowering of covert policing power thresholds for the purpose of targeted integrity testing.

4.55 This is not to say, however, that the use of such serious powers in the course of an integrity test would always be appropriate, and the committee does not argue for the unconstrained use of such powers against law enforcement officers. The committee is therefore of the view that a legislative scheme enabling the use of covert powers for integrity testing would require a balance to be struck in setting thresholds of seriousness of offence and the quality of the intelligence required to authorise a targeted integrity test. These considerations are depicted in the diagram below.

33 AFP, answer to question on notice, 19 August 2011 (received 13 October 2011).

Figure 1: thresholds for use of covert policing powers**Recommendation 5**

4.56 The committee recommends that relevant legislation be amended, or if necessary, created, so as to allow covert policing powers to be used for the purpose of targeted integrity testing of an officer or employee of an agency under the jurisdiction of ACLEI, or group thereof, where there are allegations or suspicions of corrupt behaviour.

Oversight and accountability

4.57 Due to the invasive nature of integrity testing, the oversight and reporting arrangements are key issues of interest to the committee, submitters and witnesses. The committee heard that ACLEI's role could be similar to some aspects of its role in corruption investigations:

[C]onsistent with the present framework too, that agency heads notify me of corruption issues as they become aware of them, and I would similarly require to be notified beforehand of what their intentions were, if they propose an integrity test—both to keep on top of patterns and trends of where they were seeing concerns, as well as to make sure that there was deconfliction for anything I had intended to do or was doing that they might not know about.³⁴

4.58 The Integrity Commissioner informed the committee in relation to the notion of accountability in integrity testing:

I suggest to you I take these issues into account already in terms of when I am notified of a corruption issue or one is referred to me, or when I become aware of one through ACLEI's own work. These issues arise already: how this matter is handled; the protection of a person's reputation; and the

34 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 7.

question of a person's privacy. All of these issues arise already in terms of ACLEI's work and the decisions I make.³⁵

With respect to oversight, this committee already oversees the use of my extensive powers. There may be some possibility for that also to be included as it could easily be in your own focus about my work and that of ACLEI.³⁶

4.59 To ensure integrity tests were carried out appropriately, the AFP indicated that it would consider seeking legal advice possibly by consulting the Director of Public Prosecutions prior to each scenario being carried out.³⁷ The committee supports the establishment of such safeguards in the integrity test approval process.

4.60 The committee heard of keen interest in a strong reporting framework. For example, the AFPA argued that:

It is very important to get authorisation process and the management process out of the hands of the AFP, excepting that AFP investigators might be drawn in by ACLEI; they are a relatively small organisation. One of the reasons that we argued so long and hard for joint parliamentary oversight of the AFP was that accountability has to work for the credit and, as you acknowledge, the Commonwealth does invest very significant power in the AFP and in the individual investigators. It is very important to us that people in your position as elected representatives have an idea of what is going on and that the obligation rests upon ACLEI, if you go down that path, to provide reports to you.

Ultimately we would want someone from ACLEI, potentially being called before a parliamentary committee to talk about not necessarily operational details but to account for: the number of tests we have done; why we have done them; why anomalies seem on the face of it to appear, which may well be accounted for. We would have far more confidence hearing that from ACLEI after integrity tests were done than hearing it from a middle level manager in the AFP.³⁸

4.61 AGD also suggested that it would be appropriate for reporting arrangements to be set out in legislation:

If you wanted a regime where there were mandatory requirements for reporting to parliament or producing annual reports, you would need to legislate to make that requirement mandatory. That would be one example of where you might want legislation.³⁹

35 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 9.

36 Mr Philip Moss, ACLEI, *Committee Hansard*, 19 August 2011, p. 8.

37 Assistant Commissioner Leanne Close, AFP, *Committee Hansard*, 19 August 2011, p. 17.

38 Mr Jim Torr, AFPA, *Committee Hansard*, 19 August 2011, pp 47-49.

39 Ms Sarah Chidgey, AGD, *Committee Hansard*, 19 August 2011, p. 24.

4.62 The committee is of the view that integrity testing, particularly if it were to involve reduced thresholds in authorising covert policing powers, should be subject to strong oversight. This is necessary to ensure that such powers are used appropriately and provide law enforcement officers with confidence that integrity testing is subject to adequate control and in the overall interest of the agency concerned. For this reason, the committee envisions an accountability structure with four elements.

4.63 Firstly, the Commonwealth Ombudsman is already tasked with ensuring that agencies comply with legislative requirements in using covert policing powers. The Ombudsman should continue in this role in relation to any relevant powers used for the purpose of integrity testing. The committee notes that the Ombudsman could potentially have a defined role in ensuring compliance with any legislation providing for an integrity testing program.

Recommendation 6

4.64 The committee recommends that legislative amendments be made mirroring the relevant parts of controlled operations legislation so that the Commonwealth Ombudsman is enabled to provide an annual report to Parliament on the use of integrity testing and associated covert policing powers.

4.65 Secondly, the committee recommends that the Integrity Commissioner be notified of any integrity testing undertaken by law enforcement agencies. This would serve two purposes: the Integrity Commissioner would be in a position to observe whether integrity tests were undertaken for appropriate reasons, and would also ensure that agency-initiated tests did not interfere with investigations already being undertaken by ACLEI. The committee also believes the Integrity Commissioner should be informed as to the outcomes of such tests.

Recommendation 7

4.66 The committee recommends that:

- **the Integrity Commissioner be notified of any integrity test that is to be conducted by an agency within ACLEI's jurisdiction as well as the outcome of such tests; and**
- **the Integrity Commissioner may at his discretion be involved in or take control of the integrity test.**

4.67 Thirdly, agency heads are accountable to the Minister for their conduct, and this accountability would extend to the conduct of integrity testing. The committee expects that the Minister would be briefed on the number and outcome of integrity tests conducted each year.

4.68 Finally, the committee recommends that ACLEI provide it an annual briefing, in private session, on the number and outcome of integrity tests conducted in that calendar year. This would ensure that Parliament, through the committee, would be kept abreast of the use of integrity testing.

Recommendation 8

4.69 The committee recommends that as part of the committee's annual examination of the ACLEI annual report, ACLEI provide a private briefing to the PJC-ACLEI on the number and outcome of integrity tests conducted.

Conclusion

4.70 The committee is of the view that the introduction of integrity testing in Commonwealth law enforcement agencies will further strengthen the integrity system already in place. The creation of a legislative framework around integrity testing will ensure that integrity testing can be effective, while providing fairness and protection to the officers and employees concerned. For this reason, the committee commends its recommendations to the Government.

Ms Melissa Parke MP
Chair