



AUSTRALIAN PUBLIC SERVICE COMMISSIONER
STEPHEN SEDGWICK

Mr Jon Bell
Committee Secretary
Parliamentary Joint Committee on the
Australian Commission for Law Enforcement Integrity
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Bell

**PARLIAMENTARY JOINT COMMITTEE ON THE AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT
INTEGRITY—INQUIRY INTO INTEGRITY TESTING**

Thank you for your invitation to provide the Committee with a submission for this inquiry.

My submission focuses on the question of integrity testing as it relates to the Australian Public Service (APS). All of the available evidence shows that there is no systemic corruption in the APS, and indicates a very low incidence of corrupt conduct by APS employees. The existing integrity framework of the APS acts to minimise and manage the risk of corruption, and the available evidence shows that this framework is appropriate and effective.

The existing APS integrity framework

The APS integrity framework includes elements that have the effect of requiring employees to avoid actions which are or could be perceived to be corrupt. The APS Values and Code of Conduct, set out in the *Public Service Act 1999*, require APS employees, for example, to behave honestly and with integrity, to make proper use of Commonwealth resources, and to comply with all applicable Australian laws. These elements are clear in their intent, are legally binding, and can lead to penalties if they are not properly observed. The penalties can range from a reprimand to termination of employment; criminal activities could also attract penalties under the criminal law.

Overall, the integrity framework that applies to APS agencies includes:

- the APS Values and Code of Conduct set out in the Public Service Act, which are binding on Agency Heads and APS employees
- the *Financial Management and Accountability Act 1997*, which includes provisions relating to ethical use of Commonwealth resources, fraud prevention, risk management and good governance
- The Commonwealth Fraud Control Guidelines, which outline agency responsibilities for fraud prevention, reporting of fraud information, fraud investigation case handling and training of agency fraud investigators and fraud prevention officers. The guidelines apply to all agencies that are subject to the Financial Management and Accountability Act and *Commonwealth*

Authorities and Companies Act 1997 agencies that are at least 50% budget funded for their operating costs

- oversight of the management of programs and elements of governance by the Australian National Audit Office
- oversight by specialist integrity agencies where the risk is greatest, such as ACLEI's oversight of the Australian Crime Commission and now the Australian Customs and Border Protection Service.

APS agency heads are responsible for putting in place systems and processes for ensuring that their employees understand and carry out their responsibilities under the Code of Conduct and other legislation. They are also required by the Public Service Act to establish procedures for determining breaches of the Code of Conduct, which must meet the basic procedural requirements set out in the Commissioner's Directions. This is informed by the principle that Agency Heads are best placed to manage misconduct in their own agencies, having regard to their working environment and risk profile.

This arrangement is supported by a system of review that enables APS employees to apply to their agency for review of employment-related decisions that affect them, and, if they are not satisfied with the outcome, to apply to the Merit Protection Commissioner for secondary review. APS employees can also apply directly to the Merit Protection Commissioner for review of a determination of a breach of the Code and/or any sanction imposed.

Investigations that raise questions of serious corruption or a breach of criminal law are usually referred to the police. In some larger agencies, they might be investigated by internal fraud units. In either case, the outcome could involve both a criminal conviction and a sanction for a breach of the Code of Conduct.

Agencies are supported in their role by the work that the Commission does at a whole of Service level, in particular by:

- promoting the APS Values, including by providing detailed guidance and appropriate support through development programs, and
- evaluating the extent to which agencies have integrated the Values into their workplace arrangements—particularly through data collected for the State of the Service Report, but also supplemented with specific issue evaluations as required.

In addition, the Public Service Act gives the Public Service Commissioner the power to undertake special inquiries, including the ability in certain circumstances to compel witnesses to give evidence and to produce documents.

The framework represents a particular risk management approach relevant in the context of a well-embedded ethical culture. Inherent in the framework are arrangements for managing the risk of corruption, including in circumstances where large sums of money are being expended.

The evidence suggests that the arrangements in place for managing the types of misconduct that typically occur in the APS are working well. My State of the Service Report 2009-10 listed the main types of misconduct that were investigated during the year. The three most common types of misconduct were:

- misuse of internet and email
- inappropriate behaviour of employees, other than bullying or harassment, during working hours (e.g. treating clients or stakeholders disrespectfully)
- improper access to personal information.

Of approximately 165,000 employees, only 69 were investigated for making improper use of their position or status; 19 for unauthorised disclosure of information; and 17 for theft.

The misconduct that was found was overwhelmingly characterised by isolated acts of poor judgement, rather than systemic misbehaviour, maladministration or corruption.

Integrity testing

The question of integrity testing was addressed in the Committee's Interim Report on its inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006*. That report cited the following definition of 'integrity testing':

An integrity test involves the creation of a situation or condition that is designed to provoke a reaction by the subject of the test. The subject is allowed to perform, or fail to perform, in a manner consistent with departmental and legislative requirements. (Para 3.61)

The Interim Report made it clear that an appropriate balance must be maintained between equipping law enforcement agencies to detect and eradicate corruption, and the ethical and resource implications that attend an integrity testing regime. The Committee did not recommend an integrity testing regime across Commonwealth agencies, but rather noted that it 'supports in principle the introduction of an integrity testing program within the AFP.'

This is consistent with the Commission's view that a case has not been made to justify the introduction of widespread integrity testing across the APS, or even for widespread integrity testing within APS agencies that have a law enforcement function. The Interim Report made clear that integrity testing is time-consuming and resource-intensive, and it seems difficult to justify such significant outlay in an environment where the evidence suggests that the risk of corrupt conduct is being appropriately managed. That said, it is open to individual APS agencies to choose to undertake integrity testing if the relevant agency head believes it appropriate in the particular circumstances of the agency and that it is consistent with the APS Values and Code of Conduct.

Under the Public Service Act, APS agency heads, on behalf of the Commonwealth, have all the rights, duties and powers of an employer in respect of APS employees in their agency. They may engage persons as APS employees and, under section 22(6) of the Act, may make such engagements subject to conditions including, but not limited to, matters such as probation,

citizenship, formal qualifications, security and character clearances, and health clearances. If the agency head deemed it appropriate, and if it was relevant to the duties to be performed, he or she could set as a condition of engagement the requirement to pass a periodic integrity test.

For existing employees, the requirement to maintain the requisite standards for an integrity test could be regarded as an 'essential qualification'. Section 29 of the Act provides that employment may be terminated for loss of such a qualification. The process leading to such a decision may be reviewable under an agency's review of action procedures, or by the Merit Protection Commissioner. It may be open to an agency head, too, to require integrity testing as a matter of policy in the agency, consistent with the agency head's employer powers under the Act. In instituting such a policy, though, an agency head would need to be mindful of their common-law duty as an employer to act in good faith towards their employees.

The Commission supports agencies taking the steps they consider necessary to maintain confidence in their employees—such as pre-employment checks and security vetting—where required for particular roles, and within legal frameworks. Consistent with the Act, such measures are employment-related matters and are, appropriately, a matter for agencies. It would not be inconsistent with the Act for an agency head to introduce integrity testing in their agency. That said, it may be appropriate for an agency considering the introduction of an integrity testing regime to seek advice from ACLEI on the question of whether it would be useful to do so in the circumstances.

Furthermore, an agency considering integrity testing of its employees would need to consider this in light of the APS Values and Code of Conduct, including the need to act honestly and with integrity in the course of APS employment, and with the relevant APS Values that state that the APS

- has the highest ethical standards (s.10(d)),
- establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace (s.10(i)), and
- provides a fair, flexible, safe and rewarding workplace (s.10(j)).

As I understand it, integrity testing may be conducted in a random or a targeted way within an organisation. The aim of random testing is general deterrence of employees from corrupt behaviour. Targeted testing involves employees already thought to be engaging in misconduct.

An agency considering random integrity testing, in particular, would need to consider the effects of this practice with a view to its effect on workplace relations—especially in an environment where there was little evidence of corruption.

It would be appropriate for agencies considering the introduction of even a targeted integrity testing regime to weigh up this option against other means of identifying and managing misconduct. Targeted integrity testing would be undertaken, presumably, in cases where some evidence already existed of misconduct. Agencies therefore would need to consider carefully what is to be gained by addressing suspected misconduct through integrity testing in preference to agency misconduct procedures (required to be established under s.15(3) of the Act).

In summary, integrity testing is not a practice that is undertaken as a matter of course in the APS at the moment. As I have stated in previous submissions to this Committee, there is no evidence of serious, systemic corruption in the APS and the case has not been made to expend the significant resources needed to introduce widespread integrity testing. At least in principle, the Public Service Act would not seem to prevent an agency head moving to introduce integrity testing if he or she believes that the costs can be justified in their circumstances.

Thank you again for the invitation to provide a submission to the committee about this matter. If there is anything that I can add to or clarify, I would be pleased to discuss that matter with you further.

Yours sincerely

Stephen Sedgwick

8 August 2011