

**Attorney-General's Department additional information to the Parliamentary Joint  
Committee on the Australian Commission for Law Enforcement Integrity**

**Inquiry into Integrity Testing**

As requested during the hearing on 19 August 2011, the Attorney-General's Department (AGD) is pleased to provide this additional information to the Parliamentary Joint Committee (PJC) on the Australian Commission for Law Enforcement Integrity (ACLEI) for the purposes of its Inquiry into Integrity Testing.

**1. Entrapment in the US and the 'unwary innocent' test**

Entrapment is an established criminal defence in the US that has developed through case law. However, US courts, including the US Supreme Court, have demonstrated different approaches to considering entrapment in different cases. As a result, although the existence of the defence of entrapment in the US is not disputed, the specific legal test that should be applied is still subject to some discussion.

*'The unwary innocent'*

The US Supreme Court case of *Sherman v. United States* 356 U.S. 369 (1958) involved two recovering drug addicts, Kalchinian and Sherman, who met during their drug treatment process. Kalchinian was also an informant for the US Federal Bureau of Narcotics. Kalchinian sought drugs from Sherman, stating that his own treatment wasn't working. Although Sherman initially resisted, he eventually agreed to sell Kalchinian drugs and was arrested as a result.

In this case, the Court laid down an important early test for entrapment, stating that to determine whether entrapment has been established, 'a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal'. The Court found that Sherman had been entrapped as he did not have the predisposition to break the law (i.e. Sherman was an 'unwary innocent'), taking into account Sherman's efforts to get clean, the fact that Sherman did not profit from the drug sales and the absence of drugs in his apartment.

*Subjective test vs. Objective test*

The 'unwary innocent' test used in *Sherman v United States* was applied in some subsequent cases and has developed into the 'subjective test' for entrapment. The subjective test focuses on the state of mind of the particular accused, including their predisposition or otherwise to commit the crime, rather than the actions of law enforcement officials. The purpose of this test is to ensure that otherwise innocent individuals will not be lured into committing crimes as the result of overzealous law enforcement.

However, some judges and courts in the US have also advocated a competing 'objective test' that focuses instead on the activities of law enforcement officials. The question asked here is whether or not it was the conduct of the officials that 'created' the crime. This test ignores

the subjective element of the accused person's mindset and it is irrelevant whether or not the accused has any predisposition commit the crime.

### *Jacobson v. United States*

The most recent US Supreme Court case that considered entrapment was *Jacobson v. United States* 503 U.S. 540 (1992). This case revolved around Jacobson, who had been known to the US Postal Service (USPS) as he had previously ordered pictures of nude minors through the mail (which had been legal at the time). Soon after this activity became outlawed, Jacobson was the subject of a targeting mailing campaign over a period of 26 months (which primarily involved the USPS posing as various fictitious organisations) which culminating in Jacobson ordering illegal material through the mail.

In this case, the Supreme Court narrowly agreed that Jacobson had been entrapped. The majority of the Court agreed that the Government needs to prove beyond a reasonable doubt that the defendant has a predisposition to commit the crime, which was not proven here. In this case, the Government did not prove that Jacobson's predisposition to commit the crime was independent of, rather than being a result of, the Government's conduct.

*Jacobson v United States* is the most recent US Supreme Court authority on entrapment. However, the case did not discuss the subjective vs. objective test debate in detail, choosing rather to take a slightly separate approach as outlined above. Subsequent cases in lower courts have approached the issue of entrapment variably and as a result, there remains some ambiguity in relation to the 'correct' legal methodology to be applied in the US.

## **2. Inducement under the Commonwealth Controlled Operations regime**

AGD is not aware of any instances, since the case of *Ridgeway v the Queen* (1995) 184 CLR 19 and the legislative amendments that were made in response to this case, where a court has found that a Commonwealth controlled operation was conducted inappropriately because of inducement.