



**Parliamentary Joint Committee on
the Australian Commission for Law
Enforcement Integrity
Inquiry into integrity testing**

**Submission by the
Australian Federal Police**

August 2011

Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJC ACLEI) inquiry into the possible introduction of a law enforcement integrity testing framework at the Commonwealth level.

2. The AFP understands that this inquiry builds on previous consideration of integrity testing by the PJC ACLEI as part of the 2009-10 inquiry into the *Law Enforcement Integrity Act 2006* (the LEIC Act Inquiry).

3. Before addressing the specific terms of reference for the inquiry, this submission provides an overview of the AFP professional standards framework to provide the Committee with the relevant context in which integrity testing within the AFP might occur.

AFP professional standards framework

4. The AFP places a high priority on safeguarding the integrity of the organisation to ensure it meets the expectations of Government and the community it serves. The AFP professional standards framework assists AFP employees to make ethical, reasonable and informed decisions that comply with relevant legislative and administrative requirements, as well as broader Commonwealth policies and best practice procedures.

5. The AFP Core Values and the AFP Code of Conduct require all AFP appointees¹ to exercise their powers, and conduct themselves, in accordance with legal obligations, and the professional standards expected by the AFP, the Government, and the wider community.

6. AFP appointees are subjected to high levels of accountability and scrutiny in relation to both their on-duty and off-duty conduct. Commissioner's Order 2 sets out the professional standards expected of AFP appointees in the performance of their duties. In essence, AFP professional standards are determined through:

- the *Australian Federal Police Act 1979* (the AFP Act);
- the *Australian Federal Police Regulations 1979* (the AFP Regulations);
- Commissioner's Orders (made under section 38 of the AFP Act);
- Commissioner's Financial Instructions;
- the AFP Core Values and AFP Code of Conduct;
- Commander's Orders;
- National Guidelines;
- Practical Guidelines; and
- AFP policies.

¹ Section 4 of the *Australian Federal Police Act 1979* (the AFP Act) defines an 'AFP appointee' means the Deputy Commissioner, AFP employees, special members, special protective services officers, persons on overseas engagement, consultants or independent contractors and secondees.

7. Professional Standards (PRS) is the functional area of the AFP that is responsible for the development and maintenance of a robust and transparent framework to safeguard the integrity of the AFP. This regime is underpinned by three essential pillars: prevention, detection and response.

8. Prevention strategies are designed to minimise the risk of fraud, misconduct or corruption from occurring. A significant part of the PRS internal structure is dedicated to education and prevention. Detection strategies are designed to discover fraud, misconduct and corruption when it occurs. Response strategies focus on the evaluation and investigation of serious misconduct or corruption matters.

9. Part V of the AFP Act provides the legislative framework for professional standards and complaints resolution. The tiered model adopts a graduated professional standards approach according to the seriousness of the matter and places complaints into one of four categories.

- Less serious matters are dealt with managerially and resolved at a local level wherever possible without the full weight of an internal investigation.
- More serious matters are referred to PRS for investigation.
- Corruption matters are referred to the Australian Commission for Law Enforcement Integrity (ACLEI).

The Commonwealth Law Enforcement Ombudsman also maintains an oversight role in relation to all AFP professional standards matters and has the power to conduct an own motion investigation into the AFP.

(a) The various integrity testing models, including the advantages and disadvantages of random and targeted integrity testing, effectiveness as a corruption deterrent, and possible entrapment issues

Integrity testing models: targeted versus random testing

10. Integrity testing is considered by many Australian and international law enforcement agencies and oversight bodies as a valid tool in preventing and detecting unethical behaviour, corruption and serious criminal offences.

11. 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 requirement. A subject will 'pass' an integrity test if his or her conduct was consistent with organisational and legislative requirements. A subject will 'fail' an integrity test if, for example, he or she engaged in corrupt activity or criminal behaviour.

12. There are, broadly speaking, two types of integrity testing: targeted and random testing. Both types of testing involve simulated events that place a subject, unwittingly, in a situation with an opportunity for unethical and/or unlawful decision-making. However, a key difference between the two types of testing is that random testing is focussed on *preventing* unacceptable conduct whereas targeted testing is primarily for *detecting* unacceptable conduct (although there can be a flow-on deterrent effect).

- **Targeted testing:** the testing of a specific individual or group of individuals on the basis of intelligence indicating a corruption or serious misconduct issue.
 - Targeted testing can be used where there is sufficient information to suggest improper behaviour, but insufficient evidence to support the investigation of a particular incident or the prosecution of a criminal offence.
 - Integrity testing is conducted on a targeted basis even where the identity of the test subject is not known but where there is intelligence to indicate that there may be individuals within a group who pose an integrity issue. For example, intelligence might suggest that a particular team is at risk of corruption, but which member poses the risk has not yet been determined.
- **Random testing:** the testing of subjects on a systematically random basis, where there is no intelligence to suggest that there is a particular integrity issue with a specific individual or group.
 - While in theory all persons within an organisation could be subject to a random integrity test, it is more likely that testing would be focussed on positions in which persons are more likely to be exposed to opportunities for misconduct or corruption.

13. The AFP has been actively considering integrity testing for several years. In order to properly examine the issues associated with the development and implementation an integrity testing regime, the AFP undertook a desktop benchmarking exercise² and formed an internal working group to consider the complex legal, financial and human impact of the various models. The AFP also consulted the Australian Federal Police Association on possible elements of an integrity testing regime.

14. The AFP is a member of the Australian New Zealand Police Advisory Agency (ANZPAA) Integrity Testing Practitioners Committee (ITPC) which coordinates arrangements between agencies for integrity testing and covert operations into conduct by police. Through participation in the ITPC, the AFP has had an opportunity to learn from the experiences of the other agencies that are represented in that forum.

15. On the basis of the research reviewed, internal deliberations and experiences to date through the ANZPAA ITPC, the AFP supports targeted over random integrity testing for the following reasons.

² Key research publications include: Prenzler, T. 'Senior police managers' views on integrity testing, and drug and alcohol testing', *Policing: An International Journal of Police Strategies & Management*, (2006 Vol:29 Issue: 3, pp 394 – 407); Prenzler, T and Ronken, C. 'Police Integrity Testing in Australia', *Criminology and Criminal Justice* (August 2001, pp319-342); Prenzler, T and Ransley, J (eds), *Police Reform: Building Integrity*, 2002, Federation Press, Sydney; and Wood, J, *Royal Commission into the New South Wales Police Service: Final Report*, 1996, Government of the State of New South Wales, Sydney.

16. Random integrity testing has not generally been successful in promoting a professional and ethical workplace. Random integrity testing can have a greater negative impact on the culture, morale and productivity of the workforce than targeted testing. Employees may feel that they are not trusted, and may become less efficient due to fears that they are constantly being monitored. A targeted testing regime, however, can be effectively marketed as part of a suite of focussed intervention strategies that are used where there is intelligence indicating improper behaviour. Further, it is important to engage the relevant union in relation to the employees that would be subject to the integrity testing regime.

17. Covert investigations into police or police agency employees are challenging due to the ability of targets to check databases and indices to confirm the cover stories of operatives. A properly prepared integrity test requires extensive research, analysis and planning, backstopping, operational delivery and security using a scenario that is capable of withstanding a high level of scrutiny. Agencies conducting integrity testing require specialist training and skills such as: intelligence and analysis; surveillance; technical support, legal compliance, and administration. Covert operatives not known to agency staff are also required in order to conduct the tests.

18. The costs involved for an agency conducting an integrity testing regime will vary depending on whether the regime is fully internal or fully outsourced. The AFP has developed four possible models for an integrity testing capacity within the AFP. These models are set out at **Attachment A** to this submission and are summarised below.

- A fully internal, dedicated unit with the AFP that would be responsible for conducting all facets of an integrity testing regime could cost up to \$8M per year (Model A, Table 1, Attachment A).
 - The advantage of this model is that the AFP would own and control all facets of an integrity testing regime, and would not be exposed to risks associated with outsourcing testing to external agencies.
 - However, the costs associated with maintaining full integrity testing capability are high.
- A fully outsourced model would have no establishment costs, and integrity testing would be conducted on a wholly user-pays basis (Model D, Table 1, Attachment A).
 - However, the AFP would have no control over the integrity testing regime.
- The AFP prefers a consultancy based model in which the AFP retains ownership and control over some elements of the integrity testing regime but outsources the majority of the capabilities required to conduct integrity testing (Models B and C, Table 1, Attachment A).
 - A user-pays model does not require the AFP to maintain integrity testing specialist skills and equipment. Tests can be conducted on an 'as needs' basis.

19. The costs of integrity testing must be commensurate with the expected benefits. Research indicates that the costs of a random program can outweigh the gains. An oft cited 1996 study by KPMG into the New York Police Department's random integrity testing program indicated that the results did not justify the continuation of the program. In the sample period, random testing resulted in a low rate of 'failure', while targeted testing resulted in a much higher rate of failure.³

20. Targeted testing scenarios are generally developed based on previous complaints or intelligence about alleged behaviour, and put into effect to test the integrity of the subject in the workplace. The random selection of subjects leaves very scope for effectively tailoring the test scenario to truly test the integrity of the person involved.

Integrity testing as an effective corruption deterrent

21. It is important for an agency to take a multi-faceted approach to deterring corruption; no one measure – including integrity testing – can alone deter corruption. All three pillars of the AFP's professional standards framework – prevention, detection and response – play an important part in deterring corruption. The AFP recognises the deterrent effect of integrity testing, and considers that the introduction of an integrity testing regime would further strengthen the AFP's toolkit in combating corruption. However, integrity testing as a capability cannot be pursued to the detriment of other capabilities such as: education and training, early detection, a strong leadership culture, and effective guidance to assist AFP appointees to make ethical decisions.

Entrapment

22. The AFP acknowledges that the introduction of an integrity testing regime raises issues of entrapment (inducement and fairness questions). Entrapment could arise in an integrity testing context if the test was conducted in a way that was likely to induce the subject to engage in unethical, corrupt or criminal behaviour that he or she would not otherwise have intended to commit. The AFP considers that the benefits to be gained by integrity testing would be significantly undermined if it was conducted in a way that encouraged rather than deterred inappropriate behaviour.

23. The AFP has given careful consideration to potential issues of entrapment and is of the view that the most appropriate way to address these issues is through an integrity testing regime that has:

- carefully defined parameters, enshrined in legislation and in accompanying administrative arrangements; and
- that is subject to appropriate approval, reporting and oversight mechanisms.

24. Elements of the legislative and administrative framework that might underpin an integrity testing regime – and could address issues of entrapment – are set out below.

³ KPMG (1996), *Report to the New York City Commission to Combat Police Corruption: The New York City Police Department Random Integrity Testing Program*, NYC Commission to Combat Police Corruption, New York, NY.

(b) The legislative and administrative framework required to underpin an integrity testing regime

25. The AFP notes that it would be possible for an integrity testing regime to be established without a legislative basis. For example, the AFP Commissioner could establish an integrity testing program within the AFP that is supported by an administrative framework. For example, governance instruments could articulate the purpose, form and parameters of the integrity testing regime and particular functional areas within the AFP would be accountable to the AFP Executive for the regime. However, a legislation-based integrity testing regime has significant advantages over a purely administratively-based regime.

26. 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. A legislative framework for integrity testing would 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.

27. In the absence of a legislative basis for integrity testing, the regime could be open to individual legal challenges about the legality of tests that are conducted. This situation occurred in relation to AFP drug testing, which was conducted on an administrative basis until 2000 when the AFP Act was amended to provide a legislative base for drug testing. In 1997, Finn J of the Federal Court of Australia, in *Anderson v Sullivan* [1997] FCA 1008 (24 September 1997) considered whether an AFP member could be lawfully directed to provide a urine sample for drug testing purposes in the absence of a legislative basis for such testing to occur.

28. Finn J confirmed the command powers of the Commissioner of the AFP, as the head of a disciplined force, to order drug testing to occur. However, in his concluding remarks, Finn J observed that the AFP administrative arrangements for drug testing were complex and imperfect, and that he hoped that a more 'clear and certain system' would be developed for future use. In response to this case, a statutory basis for drug testing was inserted into the AFP Act by the *Australian Federal Police Legislation Amendment Act 2002*.

29. In many integrity test scenarios, it may be necessary to use undercover operatives using assumed identities, or to rely on other covert police powers such as controlled operations, use of surveillance devices or access to telecommunications. However, the availability of covert policing powers will depend on whether the circumstances of the integrity test meet the threshold requirements for the use of those powers.⁴

30. For example, a controlled operation can only be authorised where the authorising officer is satisfied on reasonable grounds that a serious offence has been, is being, or is likely to be committed. Serious offence is defined by reference to certain types of offences which carry a maximum penalty of three or more years imprisonment.

⁴ Part IAB of the *Crimes Act 1914* – controlled operations; Part IAC of the *Crimes Act* – assumed identities; *Surveillance Devices Act 2004* – surveillance devices; and *Telecommunications (Interception and Access) Act 1976* – access to telecommunications content and data.

31. This means that where an integrity test does not meet the threshold requirements for the use of covert police powers, the suite of tools available for integrity testing is limited. A legislation-based regime could overcome these restrictions.

Possible elements of a legislative-based integrity testing regime

32. In developing legislation for integrity testing, the AFP considers that it would be useful to draw on relevant legislation governing covert policing powers that could, to a large extent, mitigate the risk of entrapment.

33. The courts and successive parliaments have recognised that the police have a legitimate operational need to engage in range of covert activities, in some cases illegal, to uncover serious crimes. The public interest, however, has been considered to be best served by regulating the conduct of covert activities through specific legislation and ensuring that appropriate safeguards and accountability mechanisms apply.

34. The legislation which governs covert law enforcement activities (such as controlled operations, assumed identities, the use of surveillance devices, and access to telecommunications data and content) have common elements that could be drawn upon to guide the operation of an integrity testing regime.

35. The key elements of a legislative framework for targeted integrity testing, and some of the issues that would need to be considered, are set out below.

- **The threshold test for conducting an integrity test:** The two key issues for consideration in framing a threshold test are: what kind of conduct could trigger an integrity test, and on what grounds could an integrity test be conducted.
 - Should integrity testing apply to all kinds of unethical or unprofessional conduct or be limited to corruption and serious criminal activity (and if so, how will corruption and serious criminal activity be defined)?
 - Should integrity testing be conducted where such intelligence *suggests* certain conduct exists, or where there is *reasonable suspicion* that certain conduct exists.
- **The extent of integrity testing activities:** Careful consideration will need to be given as to the suite of covert investigative powers that will be available for conducting integrity testing.
 - A particular challenge is how the availability of such powers for integrity testing can be reconciled with the primary purpose for those powers (ie criminal investigation).
 - This will be important if the threshold test for conducting an integrity test is lower than the current threshold test for the use of those powers.

- **The authorisation process for conducting integrity tests and the level at which authorisation must occur:** Issues to consider include whether integrity testing should be subject to internal or external authorisation, what needs to be considered by the authorising officer, and any associated formalities with the authorisation.
- **The record keeping and reporting requirements for integrity testing:** It will be important to clearly set out what records an agency must keep in relation to integrity tests, and how onerous the reporting requirements should be.
 - Should agencies that conduct integrity tests be required to report on their activities?
 - If so, should reporting happen on an annual or six monthly basis?
 - Should the report be tabled in Parliament, and if so, should there be a mechanism to remove operationally sensitive information before tabling?
 - The interaction between the reporting requirements for integrity testing and existing reporting requirements for the use of covert police powers will need to be carefully considered so that accountability requirements are cleared.
- **Oversight and monitoring of the integrity testing regime:** It will be important to determine whether there should be external, independent oversight and monitoring of integrity testing.
 - There are two agencies that could oversee integrity testing:
 - the Commonwealth Ombudsman (which conducts inspections in relation to certain covert police powers used by the AFP and has oversight in relation to non-corruption related AFP professional standards matters); and
 - ACLEI (which may investigate corruption related AFP professional standards matters).
- **How evidence obtained from an integrity test can be used:** A decision will need to be made as to whether there will be any limitations on the use of evidence obtained from an integrity test. Any permitted use of evidence will need to address potential issues of entrapment / inducement.
- **Protection for officers conducting integrity tests (ie from civil or criminal liability):** It will be important to protect officers conducting integrity testing from any criminal or civil liability provided those officers acted in accordance with the authorisation of the integrity test, and did not intentionally induce a person to do something he or she would not have otherwise done.

(c) The Commonwealth agencies to whom an integrity testing regime could apply

36. While there is no evidence of systemic corruption in the AFP, the implementation of an integrity testing regime would provide an additional capability in the AFP professional standards toolkit. Such an enhancement could further strengthen the AFP's professional standards framework, and provide greater public confidence in the AFP. Integrity testing could also reduce the need for PRS investigations by providing a deterrent to inappropriate behaviour.

37. The AFP considers that a decision on whether integrity testing is appropriate and necessary for an agency is one that needs to be made on a case-by-case basis, taking into account:

- the existing integrity framework of the agency;
- the potential for unethical, corrupt or criminal behaviour within the agency;
- the impact of such behaviour on the reputation and standing of the agency; and
- an analysis of the resources required to conduct integrity testing and the outcomes that could be achieved through such testing.

(d) The potential role of the Australian Commission for Law Enforcement Integrity in integrity testing

38. The exercise of covert investigative powers in the criminal context is balanced by safeguards and independent oversight accountability mechanisms. As discussed above, there is potentially a role for either the Commonwealth Ombudsman or ACLEI performing a monitoring role in relation to any integrity testing regime. It would also be useful to explore options for involving ACLEI in the preparatory stages of an integrity test (including a possible role at the authorisation stage), and the conduct of joint AFP/ACLEI integrity tests. ACLEI may also wish to conduct integrity tests in its own right.

(e) Any other relevant matters

39. The AFP does not wish to make any comments in relation to paragraph (e) of the terms of reference.

Integrity testing models

The AFP has identified 12 capabilities for integrity testing, which are set out below.

- | | | |
|---------------------------------|---------------------------------|-----------------------|
| 1. Field intelligence gathering | 5. Scenario development | 9. Test authorisation |
| 2. Integrity test request | 6. Legal compliance | 10. Final Approval |
| 3. Integrity test assessment | 7. Risk analysis | 11. Execution of test |
| 4. Feasibility study | 8. Operational plan development | 12. Post test action |

Table 1 – Integrity testing models

The following table indicates, for each of the different models, which capabilities would be performed by the AFP (the remaining capabilities would be performed by an external service provider) and whether the establishment and ongoing costs (excluding the cost of integrity tests themselves) would be high, medium or low. The cost of an integrity test will vary depending on the resources required to effectively execute the scenario. The total annual costs for conducting integrity tests will depend on the number of tests conducted each year.

Model	1	2	3	4	5	6	7	8	9	10	11	12	Cost
A	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	High
B	✓	✓	✓							✓	✓	✓	Medium
C		✓								✓	✓	✓	Low
D												✓	Nil