



Our ref: 11/124693

Committee Secretary
Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity
PO Box 6100
Parliament House
Canberra ACT 2600
Sent via email to: aclei.committee@aph.gov.au

Dear Mr Bell

Inquiry into Integrity Testing

1. The Australian Crime Commission (ACC) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on the Australia Commission for Law Enforcement Integrity with regard to the inquiry into integrity testing. This submission is unclassified. The ACC is willing to provide classified material in a further submission or in camera should the committee require further information.
2. The ACC is Australia's national criminal intelligence agency. Our purpose is to unite the fight against nationally significant crime. This involves working with partner agencies to develop a national understanding of serious and organised crime.
3. The ACC works in partnership with other law enforcement agencies and Australian Public Service (APS) agencies under task force, joint operations and intelligence-sharing arrangements, to gather intelligence and investigate criminal activity. The ACC uses coercive powers and traditional law enforcement techniques such as physical and technical surveillance, controlled operations and Covert Human Intelligence Sources (informants).
4. The ACC's integrity framework contributes to effective fraud and corruption control within the ACC with appropriate prevention, detection, investigation and reporting procedures. The ACC has developed proactive audit and review programs across all operational and administrative areas, and has introduced corruption prevention measures in high risk areas. These measures ensure best practice in fraud and corruption control.

Scope

5. This submission provides important background information regarding current integrity assurance methodology within the ACC as well as comments on the terms of reference. The ACC hopes that this submission will inform future discussions on this topic between the ACC, the Parliamentary Joint Committee, and other relevant partner agencies and non-government organisations.

ACC Integrity Framework

6. The ACC demands a high standard of conduct and integrity from all ACC staff. As the ACC Chief Executive Officer (CEO) my intention is to demonstrate 'tone at the top' through the promotion of the ACC integrity framework.

7. A key objective for establishing a strong ethical culture is resistant to corruption is through the establishment of an integrity framework to ensure that the fraud and corruption risks faced by the agency are identified, understood and managed. An integral component of the integrity framework is through the education of staff and promotion of staff participation in strategies to prevent and detect fraud and corruption through risk management, reporting and continuous refinement of those strategies.

8. The ACC is established by s 7, *Australian Crime Commission Act 2002* (ACC Act) and consists of the ACC CEO; and the examiners; and the members of the staff of the ACC. Member of the staff of the ACC means:

- a. a member of the staff referred to in subsection 47(1); or
- b. a person participating in an ACC operation/investigation; or
- c. a member of a task force established by the Board under paragraph 7C(1)(f);
or
- d. a person engaged under subsection 48(1); or
- e. a person referred to in s 49 whose services are made available to the ACC;
or
- f. a legal practitioner appointed under s 50 to assist the ACC as counsel.

9. The ACC is an APS agency and, as part of the broader Australian government's financial management framework, I must ensure that the agency is compliant with legislative requirements and standards for effective fraud control in the Commonwealth.¹ As best practice the ACC has included 'corruption risks' when managing fraud within the ACC.

10. While every CEO wants to have confidence in the team, international and domestic experience has shown that even the most trusted people are vulnerable to corruption. The role of the ACC is combating serious and organised crime, we are aware that every step of the intelligence chain carries with it a risk of compromise. Likewise, investigations which involve contact with criminals and exposure to criminal opportunity carry an inherent risk of corruption.

11. The ACC is a unique agency in that it encompasses public service and law enforcement cultures in the one environment. A high percentage of operational staff participating in joint operations and ACC task forces are seconded from other APS and law enforcement agencies.

12. The ACC's oversight body is the Australian Commission for Law Enforcement Integrity (ACLEI). The ACC is compliant with the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act), which requires the CEO to notify the Integrity Commissioner of corruption issues as soon as practicable.²

13. In June 2009 ACLEI released its 'Resistance to Corruption' report – consisting of a review of ACC integrity regime. The report found that the ACC:

¹ *Financial Management & Accountabilities Act 1997*; Commonwealth Fraud Control Guidelines 2011 and the Australian Government Investigation Standards.

² ACLEI also has jurisdiction over the former National Crime Authority (NCA) which was the forerunner to the ACC: S 10, LEIC Act.

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- is realistic about corruption risk
- senior management is prepared to reorganise operations to reduce corruption risks and undertake difficult cultural change
- has key integrity policies and practices in place
- informed and competent management is driving the values-based program which is well directed and reflects contemporary design
- has developed a whole of agency professional standards program
- is flexible and able to respond to emerging issues

14. Fraud and corruption control in the ACC is based on the following principles:

- prevention, detection and investigation
- prosecution of offenders where appropriate
- application of appropriate civil, administrative or disciplinary penalties
- recovery of proceeds of criminal activity
- dissemination of corruption issues to ACLEI
- external scrutiny of fraud control activities; and
- reporting to Government and accountability to Parliament

15. The ACC integrity framework includes prevention, reporting, detection and investigation methodologies. The ACC's program includes:

- risk assessments and Fraud Control Plan
- development of Corruption Prevention Plan
- random drug and alcohol testing of Senior Executive Staff and high risk operational staff
- operational random audits (exhibit management and covert human source management)
- staff awareness training programs (EL professional leadership program, induction and mandatory ethics and fraud awareness)
- communications strategy to raise awareness and to encourage reporting
- regular and random compliance audits, external audits, SES random audits
- corruption resistance reviews
- multi-disciplinary team structure
- selection and vetting procedures
- psychological profiling and testing
- proactive investigations on high risk areas
- proactive data analysis techniques to identify anomalies

The ACC's Position

16. The ACC supports targeted integrity testing, the introduction of integrity testing by ACLEI, by the ACC (in consultation with the ACLEI), jointly with ACLEI, or an agency authorised by ACLEI.

17. The introduction of such an integrity testing regime would enhance and strengthen the ACC's existing integrity framework, providing another tool for the ACC to test the integrity of ACC staff.

18. I recommend:

- targeted integrity tests be undertaken at ACLEI's discretion in relation to ACC staff where a corruption issue has been identified (in consultation with the ACC)

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- targeted integrity tests conducted by the ACC (in consultation with the ACLEI), of ACC staff identified as being a corruption risk or where there is a suspicion of corruption.

Comments on the Terms of Reference:

(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*³

19. An integrity test is one that creates a situation where a member of staff who is believed to have committed suspected misconduct or a criminal act can be observed. The situation is designed to test whether the person responds in a corrupt or unethical manner.⁴ The test results may be used not only as evidence of corruption but to highlight weaknesses in the broader integrity framework of an organisation.

20. A *random* integrity test involves the manufacture of an opportunity of misconduct that is not directed toward a specific person or group. Any person could theoretically be the subject of a random test regardless of their role within the organisation or whether they present a high risk. Whereas *targeted* integrity testing is intelligence-led. A targeted test is only devised in response to some already existent evidence of misbehaviour.⁵

21. Australian state jurisdictions practice targeted testing on police officers subject to legislative constraints and independent oversight. It would be the ACC's preference that targeted testing would be adopted for use where intelligence analysis or assessment by the ACC or ACLEI suggested a serious corruption issue.

Entrapment Issues

22. The defence of entrapment is not part of Australian law. However, the conduct of investigating officials is frequently raised by the defence and may result in the exclusion of evidence through the *Bunning v Cross* test. Accordingly, it is important that an integrity test be carefully designed to avoid inducing the target to act in way that he or she would not otherwise have done.

23. A poorly designed test may preclude subsequent prosecution and complicate any attempt at disciplinary action. However, care would need to be taken in any attempt to address this issue in integrity testing legislation. For example, to simply define 'integrity test' in such a way as to exclude a test that induced the target to do something he or she would not otherwise have done might result in officers who had conducted an integrity test reasonably and in good faith being deprived of the protection of legislation against criminal and civil liability.

24. (b) the legislative and administrative framework required to underpin an integrity testing regime

25. As the ACC is an APS agency all ACC staff employed under the *Public Service Act 1999* must adhere to the APS Values and APS Code of Conduct.

26. Seconded staff whose services are made available to the ACC in accordance with s 49 of the ACC Act are considered a 'member of the staff of the ACC' under paragraph (e).

³ Colette Lebsanft, 'A Test of Integrity' (2010) Senate, Australian Parliament House

⁴ NSW Police Service, (1996) Integrity Testing Information Pamphlet.

⁵ Tim Prenzler and Carol Ronken, 'Police Integrity Testing in Australia' (2001) 1(3) Criminal Justice 319, 321

27. The ACC ensures that all secondees are aware of, understand and acknowledge that they are still subject to their parent agencies governance and professional standards framework and that they are also subject to the requirements of the:

- the *Australian Crime Commission Act 2002*
- The *Australian Crime Commission Regulations 2002*
- APS Code of Conduct, *Public Service Act 1999*
- ACC Core Values
- ACC policies and procedures.⁶

28. The Integrity Assurance Team (IAT) was established to enhance the ACC's integrity framework providing the CEO with advice and assistance in regard to the efficiency, effectiveness of the ACC and propriety of the actions of staff.

29. The IAT is required to comply with the Commonwealth Fraud Control Guidelines 2011. The IAT has put in place processes and procedures that are consistent with or exceed the model procedures for case handling standards for investigations as outlined in the Australian Government Investigation Standards (AGIS). As best practice the IAT follow Part IC of the *Crimes Act 1914* (Cth) (*Crimes Act*).

30. Effective fraud and corruption control has been achieved in the ACC through the use of appropriate prevention, detection, investigation and reporting procedures. Proactive audit and review programs are applied across all operational and administration areas of the ACC; corruption prevention measures have been introduced and ongoing research of national and international integrity and compliance initiatives is regularly undertaken. All of these measures are aimed to enable best practice in fraud and corruption control.

31. The IAT also receives allegations of suspected misconduct, alleged fraud and corruption issues, relating to former and current ACC staff. Allegations are received from external and internal sources.

32. For the purposes of conducting investigations into alleged fraud, Investigators within the IAT are considered 'investigating officials' as defined in the *Evidence Act 1995* (Cth). As stated in AGIS a Commonwealth investigator is not an 'investigating official' under the *Crimes Act*, as they do not have the power of arrest.

How would Integrity Testing apply?

33. Controlled operations are authorised under Part IAB of the *Crimes Act*. Before approving a proposed controlled operation an authorising officer must be 'satisfied on reasonable grounds' that a serious criminal offence has occurred, is occurring or is likely to occur (see s 15GI of the *Crimes Act*).

34. The use of controlled operations would thus be limited to those cases where there is already significant evidence of serious criminal conduct. Mere suspicion would not be sufficient. Integrity testing based on Part IAB as it stands would therefore be limited to targeted, as opposed to random testing.

35. Further, s 15GE of the *Crimes Act* defines serious offences so as to exclude all offences that carry a maximum penalty of less than three years' imprisonment. This means that breaches of the Code of Conduct and less serious criminal offences (including some that would raise 'significant corruption issues' as defined by the *LEIC Act*) could not be the subject of integrity testing that relied on Part IAB. Part IAB provides an additional means of

⁶ The ACC has a Memorandum of Understanding with each jurisdiction for Seconded Staff (NSW, AFP, VIC, NT, WA, QLD, TAS and SA)

conducting a criminal investigation but does not establish the underlying power to investigate.

36. The creation and use of assumed identities are authorised under Part IAC of the Crimes Act. The authority to acquire or use an assumed identity must only be granted in limited circumstances. For the purposes of the ACC, the authority to create and use an assumed identity must not be granted unless the Chief Officer, or delegate, is satisfied on reasonable grounds that it is necessary for an investigation of, or intelligence gathering in relation to, criminal activity.

37. The creation and use of an assumed identity, can also be granted for training and for administrative functions in limited circumstances, however, it is unlikely that integrity testing would fall within the scope of either of these purposes. The use of an assumed identity for the purposes of integrity testing would therefore be limited to situations where there was evidence of criminal activity. Accordingly, as noted above in relation to controlled operations, the use of Part IAC as it stands would be limited to targeted as opposed to random integrity testing.

38. Like Part IAB, Part IAC of the Crimes Act only establishes a means of conducting a criminal investigation (and, in this case, intelligence gathering). For the purposes of the ACC the power to create and use assumed identities is limited to cases which fall within the scope of an ACC Board approved operation/investigation into federally relevant criminal activity.

39. Accordingly, unless the integrity issue fell within the scope of a Board approved operation/investigation, the ACC would be unable to use this power for integrity testing without specific legislative amendment. Any amendment would have to enable the ACC to authorise the creation and use of assumed identities for integrity testing purposes.

40. If the Integrity Commissioner were to be given a supervisory role in relation to integrity testing, amendments to the LEIC Act for this purpose would need to address:

- a) the relationship between law enforcement agencies with respect to integrity testing
- b) the authorisation of the testing agency to conduct targeted integrity testing operations subject to supervision and controls
- c) the provision to testing officers of immunity from certain criminal and civil sanctions
- d) clarification of the operation of concurrent legislation relating to controlled operations
- e) the reporting and follow-up requirements that would apply.

41. Consideration will need to be given to the question whether, in an integrity testing regime that adopts the same or similar powers, it is desirable or appropriate to restrict the range of permitted targets to sworn police officers or whether it should apply equally to all staff of the agencies concerned. Given the close interaction between different classes of staff members in the operation of the ACC, we think there would be some difficulty in justifying the retention of such a distinction.

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

42. The ACC supports ACLEI undertaking integrity tests of ACC staff in consultation with the ACC, in appropriate circumstances.

(d) the potential role of the ACLEI in integrity testing;

43. The ACC would support targeted testing under strict legislative parameters undertaken by ACLEI, the ACC or another agency with the authorisation and oversight of the Integrity Commissioner. ACLEI oversight would provide assurance to the ACC of the transparency and independence of the process, guarding against potential legal and ethical issues.

(e) any other relevant matters

44. The Integrity Commissioner under the *LEIC Act* has the option to refer a matter or information back to the ACC. The ACC may consider finalising the referral, conducting a criminal investigation or misconduct proceedings.

45. The ACC would require clarification as to what information from an integrity test the Integrity Commissioner is able refer back to the agency; and how that information is able to be used by the ACC. We would anticipate that the range of possible uses for such information would be the same as for information derived from corruption investigations by the Integrity Commissioner that is referred back to the ACC.

46. For example under s 47A of the ACC Act the CEO can make a determination to terminate the employment of a member of staff for serious misconduct, this applies after a formal Code of Conduct investigation has been completed and where a decision has already been made to terminate the staff member for a breach of the Code of Conduct.

47. A referral of results of a failed test from the Integrity Commissioner to the ACC may result in the ACC using the information in:

- misconduct proceedings potentially resulting in termination of employment
- a re-evaluation of a staff members security clearance
- a criminal investigation
- performance and management issues
- amending inadequate controls, processes or policies

48. Given the potential impact of an integrity testing regime on ACC staff, the CEO would expect consultation to take place with staff associations. ACC staff are represented by the Community and Public Sector Union.

49. On behalf of the ACC, I thank you for this opportunity to make a submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity's inquiry into integrity testing. Should you wish to discuss any aspect of this submission further, please contact Carolyn Scheetz, National Manager, People, Security and Integrity on

Yours sincerely

John Lawler APM
Chief Executive Officer
17 August 2011