



Australian Government

**Australian Commission for
Law Enforcement Integrity**

**Parliamentary Joint Committee on the
Australian Commission for Law
Enforcement Integrity**

Inquiry into Integrity Testing

**Submission by the
Australian Commission for
Law Enforcement Integrity**

8 August 2011

1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on ACLEI (the Committee) concerning its *Inquiry into Integrity Testing*.

To assist the Committee, Part 2 of this submission provides background about ACLEI's role and responsibilities and Part 3 provides ACLEI's comments relating to the Inquiry's Terms of Reference, based on its operational experience and engagement in the corruption-deterrence community, including as an observer at the Australia New Zealand Policing Advisory Agency (ANZPAA) Integrity Practitioner's Forum.

2. Role and responsibilities of ACLEI

Establishment

The office of Integrity Commissioner, and ACLEI, are established by the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act).

The objects of the LEIC Act (at section 3) are:

- (a) *to facilitate:*
 - (i) *the detection of corrupt conduct in law enforcement agencies; and*
 - (ii) *the investigation of corruption issues that relate to law enforcement agencies; and*
- (b) *to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following those investigations; and*
- (c) *to prevent corrupt conduct in law enforcement agencies; and*
- (d) *to maintain and improve the integrity of staff members of law enforcement agencies.*

The agencies subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission (ACC), the Australian Federal Police (AFP) and the former National Crime Authority. The Australian Customs and Border Protection Service was added to the Integrity Commissioner's jurisdiction by regulation¹ on 1 January 2011, in respect of that agency's performance of a law enforcement function.

Role

ACLEI's primary role is to investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. ACLEI also collects intelligence about corruption in support of the Integrity Commissioner's functions.

The Integrity Commissioner must consider the nature and scope of corruption revealed by investigations, and report annually on any patterns and trends concerning corruption in law enforcement agencies.

¹ The Crimes Legislation Act Amendment Bill (No. 2) 2011, which proposes to add the entirety of Customs and Border Protection to the LEIC Act jurisdiction, was introduced into the House of Representatives on 23 March 2011.

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or the administrative practices of government agencies with law enforcement functions that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed.

Under section 71 of the LEIC Act, the Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following:

- a corruption issue;
- an issue about corruption generally in law enforcement; or
- an issue or issues about the integrity of staff members of law enforcement agencies.

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Home Affairs and Justice is responsible for ACLEI.

Impartial and independent investigations are central to the Integrity Commissioner's role. Although the Minister may request the Integrity Commissioner to conduct public inquiries, the Minister cannot direct how inquiries or investigations will be conducted.

The LEIC Act contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference and maintain an independent relationship with government agencies. Accordingly, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily;
- is appointed for up to five years;
- can commence investigations on his or her own initiative; and
- can make public statements, and can release reports publicly.

Receiving and disseminating information about corrupt conduct

The LEIC Act establishes a framework whereby the Integrity Commissioner and the agency heads can prevent and deal with corrupt conduct jointly and cooperatively. The arrangement recognises both the considerable work of the agencies in the Integrity Commissioner's jurisdiction to introduce internal corruption controls (including detection and deterrence-focussed mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staff members.

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency, irrespective of the source of that information (section 19).

The LEIC Act enables any other person, including members of the public or other government agencies or the Minister, to refer a corruption issue to the Integrity Commissioner.

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* to receive information about any corruption issue involving an agency within the

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

LEIC Act jurisdiction that may be identified by other integrity agencies or law enforcement agencies as a result of their telecommunications interception activities.

Special legislative arrangements make it lawful for “whistleblowers” to provide information about corruption direct to ACLEI. The LEIC Act provides for ACLEI to arrange protection for witnesses.

The Integrity Commissioner may disclose information to the head of a law enforcement agency, or other government agency, if satisfied that, having regard to the functions of the agency concerned, it is appropriate to do so.

The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988*, reflecting the importance of ACLEI’s collection and intelligence-sharing role.

Investigation options

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI’s jurisdiction.

The Integrity Commissioner is not expected to investigate every corruption issue that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner’s role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed appropriately.

The Integrity Commissioner can choose from a range of options in dealing with a corruption issue. The options are to:

- investigate the corruption issue;
- investigate the corruption issue jointly with another agency;
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI);
- refer the corruption issue to another agency, such as a State integrity agency, the AFP, or another government agency, for investigation; or
- take no further action.

Section 27 of the LEIC Act sets out the matters to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue.

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI’s direct involvement, for example if an independent investigation were beneficial, or if the use of ACLEI’s coercive investigation powers were desirable.

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act.

Investigation powers

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be well-versed in law enforcement methods, and may be skilled at countering them in order to avoid scrutiny. As a consequence, ACLEI has access to a range of special law enforcement powers.

The key investigative powers available to the Integrity Commissioner and ACLEI are:

- notices to produce information, documents or things;

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things;
- intrusive information-gathering (covert);
 - telecommunications interception;
 - electronic and physical surveillance;
 - controlled operations;
 - assumed identities;
 - scrutiny of financial transactions; and
 - access to specialised information databases for law enforcement purposes;
- search warrants;
- right of entry to law enforcement premises and associated search and seizure powers; and
- arrest (relating to the investigation of a corruption issue).

It is an offence not to comply with notices, or not to answer truthfully in hearings.

3. Integrity testing

What is meant by “integrity testing” and what is its purpose?

As an anti-corruption measure, an integrity test is an observed, covert, simulation that tests an employee’s adherence to the law (relating to the employee’s duties) or to key agency guidelines through a “realistic scenario”² which is designed to allow a subject a clear choice to pass or fail.

In this form, integrity testing is most commonly applied within law enforcement agencies, including the New York City Police Department³ and the New South Wales Police Force,⁴ among others.⁵ Hong Kong’s Independent Commission Against Corruption, which has the longest running integrity testing program, deploys integrity testing across the public sector generally, as well as in relation to police. In the instances noted here, integrity testing was introduced as a measure to address serious problems of systemic or endemic corruption.

In each of these programs, depending on the behaviour being tested and the design of the program, the results of individual tests may be used for training purposes, for disciplinary purposes, or to found criminal charges. Again, depending on the program design, a scenario may specifically test behaviour that may constitute corruption, or may test lower-

² See, City of New York Commission to Combat Police Corruption (March 2000) *Performance Study: the Internal Affairs Bureau’s Integrity Testing Program*, pages 28-30.

³ Since 1995, as a result of the 1994 Mollen *Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the [City of New York] Police Department*.

⁴ Since 1996, as a result of the Wood *Royal Commission into the [then] New South Wales Police Service*.

⁵ Colette Lebsanft (May 2010) *A test of integrity*, a research paper prepared for Senator Stephen Parry as part of the Australian National Internship Program. Unpublished. See, Chapter Three.

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

level wrong-doing that, if left unchecked, would contribute to a poor ethical culture and may lead to corrupt conduct becoming widespread. In both types of model, the policy purpose includes creating an “omnipresence” – a wide deterrence effect based on the prospect that wrongdoing is more likely to be detected than not.

Variations of integrity testing have been applied in other contexts, and more models are evolving to meet new demands. For instance, the New South Wales Ombudsman⁶ conducts a “mystery shopper” program in which customer service of government agencies is tested by Ombudsman staff posing as customers. Rather than to test the conduct of individuals per se, the purpose of these tests is to collect information about service standards and administrative systems and thereby improve public administration.

In a relatively new development, variants of integrity testing (Behavioural Assurance Tests⁷) are being considered for adoption as a strategy by multi-national companies to assure their regulatory compliance by effecting behavioural (cognitive) change in employees who work in high corruption risk areas. Significant drivers for this development are the potential exposure of companies to significant penalties from breaches of the United States’ *Foreign Corrupt Practices Act 1977* and the United Kingdom’s newly commenced *Foreign Bribery Act 2011*. In addition, cultural change in international business practice is being brought about by companies and their representative organisations that are partners in the United Nations-led international effort to eradicate corrupt practices in government-business relations.

These variants show that integrity testing can mean many things and needs to be thought about first in terms of purpose, from which flows questions of design.

Match measures to risks

As noted above, integrity testing programs were developed initially to address endemic and entrenched corruption problems. The continuation of programs (and the resourcing made available to them) once a ‘crisis’ has passed is premised on the on-going risk of these corruption problems re-emerging, and on judgements made about the effectiveness of integrity testing among the suite of other possible anti-corruption (or pro-integrity) measures and investigation tools.

ACLEI supports the introduction of an integrity testing capability within the LEIC Act jurisdiction. While there is no ‘corruption crisis’ in Commonwealth law enforcement, the emergence of targeting of government officials by organised crime groups in some jurisdictions means that integrity testing now warrants close consideration by agencies that may be vulnerable to such attacks.

The ‘evidence collection’ problem

Putting aside wider questions of deterrence, integrity testing ultimately involves the investigation of the conduct of an individual, albeit in a constructed situation. As an investigation tool, the method overcomes evidence-collection problems that can otherwise face anti-corruption investigators, namely:

- the familiarity of a subject with sophisticated methods to conceal his or her own subterfuge;

⁶ NSW Ombudsman (2010) *Public Sector Agencies Fact Sheet Number 10*.

⁷ Professor Michel Girodo (2011) *Making anti-corruption strategies more sustainable: Merits of a kind word and a gun” approach*. Presentation to the International Anti-Corruption Summer Academy, 2 July 2011, Laxenburg, Austria. Unpublished conference proceedings, and personal communications.

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

- conspiracy between individuals to obstruct investigations; and
- collecting direct, contemporary evidence about conduct that does not rely on:
 - inference;
 - uncorroborated information (the 'disreputable witness' and 'self-interested co-conspirator' problems);
 - information only about past events (the 'one step behind' problem); or
 - testimony of witnesses or whistle-blowers who would otherwise be exposed and placed in jeopardy.

These advantages help to explain why integrity testing, which has a relatively high average cost per investigation, is considered justified by the agencies that continue to use integrity testing programs. Indeed, if integrity testing had been an investigation strategy available to ACLEI, some past investigations would have benefitted from its use.

System design

A number of concerns have come to dominate present thinking in Australia about system design. These issues, which relate to questions of fairness and effectiveness, are discussed below.

'Targeted' or 'random'

There is no general agreement in the literature about what type of tests are included in each of these categories. At one extreme might be an integrity test for which there is specific intelligence about the misconduct of an individual, and the test forms part of a broader investigation strategy. At the other extreme, a test may concern the conduct of an individual or group of individuals in circumstances where there is no statistically-identified risk or intelligence about misbehaviour (for example, a 'deterrence' test, or a 'prevalence of misconduct' test, or a 'mystery shopper' program).

This debate is essentially about definitions, and the issue at its heart is about what circumstances it is considered reasonable to conduct an integrity test, and what should be done with the test results.

In ACLEI's view, any approval to conduct an integrity test would need to balance the positive anti-corruption benefits of any proposed test against the possible unintended negative effects that may be caused to the trust-relationship between an employee and their employer. This calculation would need also to consider any erosion to the preparedness of public officials to act with confidence, especially in a law enforcement environment in which fast judgements are required and officers have a large degree of discretion in the performance of their duties.

In practice, this proposition would mean that an integrity test should be based on intelligence about an individual or a group that provides a reasonable basis for inspecting possible corrupt conduct. However, if the aim were to encourage greater compliance with policy (for instance, registering lost property at a police station or customs hall), then random testing may be appropriate, provided the evidence were put to use as a behaviour modification and education tool.

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

Testing threshold: corruption or misconduct issues?

As noted above, integrity testing is an anti-corruption measure. However, that is not to say that integrity testing scenarios need to be restricted to serious or systemic corruption issues to be effective as a corruption prevention tool.

In his 2009–10 Annual Report, the Integrity Commissioner (at page 73) noted that misconduct issues, which may in themselves not constitute corrupt conduct, may be the visible indicators of corruption. Relevant examples of corruption indicators include misconduct involving unauthorised access or disclosure of official information, or maintaining (or not declaring) inappropriate associations.

Targeting conduct that may be a precursor of corruption may be an effective disruption strategy, and may also have beneficial deterrence effects. Accordingly, it may be more achievable to construct an integrity testing scenario around a corruption indicator (say, an unauthorised disclosure of information), than around a more serious criminal offence associated with the disclosure (for which there may be sound intelligence, but for which it may be impractical to gain usable evidence).

Fairness and “entrapment”

United States law recognises the concept of “entrapment”, while Australian law considers the element of “inducement”⁸ present.

The principle at issue in an integrity test relates to whether or not a test scenario provides the subject with an equal opportunity to pass or fail, and to what uses (behavioural reinforcement, training, disciplinary or prosecutorial) the test results will be put.

Accountability of testers

Since it is artificial, integrity testing involves misrepresentation, pretext, or guise. Accordingly, it is reasonable to expect that accountability arrangements would be established to guard against misuse of official powers and resources.

ACLEI has no firm view about how those arrangements should be designed, except that there should be a pre-approval process (which would consider whether other investigation techniques would be preferable in all the circumstances, and whether the expected benefits of conducting the test outweigh adverse factors, noting intelligence) and a final effectiveness report.

Noting the objects of the LEIC Act and the role of the Integrity Commissioner, ACLEI considers that, as a minimum, it would be appropriate for the Integrity Commissioner to be consulted about each test that may be proposed by a LEIC Act agency, and to receive progress reports and a final effectiveness report. These measures would ensure that the investigation and intelligence collection functions of ACLEI are coordinated with the activities of the agencies conducting integrity tests, and provide a safeguard against the misapplication of a testing program.

ACLEI does not favour mandatory public reporting of the outcomes or other information relating to the prevalence of integrity tests conducted, to avoid undermining the deterrence effect brought about by having the capability.⁹

⁸ See, *Commonwealth Criminal Code*, ss 142.1 and 142.2.

⁹ This view is supported by the *Second Annual Report of the City of New York Commission to Control Police Corruption* (October 1997), which recommended that the City discontinue publication of the number of integrity tests performed.

ACLEI Submission: Inquiry into Integrity Testing (August 2011)

However, some public reporting of outcomes, to prove the effectiveness of an integrity testing strategy, would be necessary if a program's goal is to reinforce the deterrent effect.

Deterrence strategies

Deterrence is said to follow from the subjective probability in the mind of an individual that his or her misconduct will be detected.¹⁰

The United Nations Office of Drugs and Crime (UNODC) recognises¹¹ evidence gathering and deterrence as the twin purposes of integrity testing as a specialised investigation technique under Article 50 of the *UN Convention against Corruption*.

ACLEI notes that introducing integrity testing to the investigation tools available to agencies (or to ACLEI) may enhance an individual's perception that misconduct will be detected (the "omnipresence" theory) and broadly be effective in that regard. Further, the deterrence effect of integrity testing also may be decisive in an individual's decision not to engage in collusive behaviour with others, or be a factor in their decision to "turn whistleblower".

However, deterrence measures may be less relevant to the psychology of a person who perceives themselves as "invincible", who is motivated by "beating the system", or who has been compromised by obligation to others and perceives little choice other than to continue his or her own participation in corrupt activity.

While improving the level of deterrence can be a goal of anti-corruption system design, strategies that are specifically directed to detecting and gathering evidence about possible misconduct and corrupt conduct should be primary aims. (As noted previously, integrity testing is one of a suite of possible measures that an agency may adopt to improve its detection and evidence gathering capabilities.)

In this regard, ACLEI wishes to recognise the achievements of the ACC, the AFP and Customs and Border Protection in keeping under review and updating their anti-corruption frameworks, and their engagement in integrity partnership with ACLEI.

Relationship with existing laws

ACLEI notes that some integrity testing scenarios could presently be conducted under present legislation, and that other tests could be constructed that would not require legislation at all. However, it may be that fairness issues are best addressed in legislation, to put jurisdictional issues, powers and accountability arrangements beyond doubt.

¹⁰ Professor Michel Girodo (2011) *Making anti-corruption strategies more sustainable: Merits of a kind word and a gun" approach*. Presentation to the International Anti-Corruption Summer Academy, 2 July 2011, Laxenburg, Austria. Unpublished conference proceedings, page 21, and personal communications.

¹¹ UNODC (2009) *Technical Guide to the UN Convention against Corruption*, page 186.