



**Commonwealth
Ombudsman**

**Report under Part 1AB, Division 2A
of the *Crimes Act 1914***

A report on the Commonwealth Ombudsman's activities
in monitoring controlled operations conducted by the
Australian Crime Commission and the Australian Federal Police.

2002-03

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Introduction

This report has been prepared by my office under Part 1AB Division 2A Section 15(UC)(1) of the *Crimes Act 1914* (the Crimes Act) and the *Measures to Combat Serious and Organised Crime Act 2001*. It provides an overview of work and activities in monitoring controlled operations undertaken by my office in the period 1 July 2002 to 30 June 2003 (the reporting period). It has two main parts.

The first describes my office's inspections of records held by the Australian Federal Police (the AFP) and the Australian Crime Commission (the ACC) in relation to controlled operations, as prescribed by s 15(UB) of the Crimes Act. The second provides an overview of my activities in forming an opinion about the comprehensiveness and adequacy of the reports that were provided to the Parliament by those law enforcement agencies (pursuant to s 15(UC) of the Crimes Act).

I have been pleased by the growing maturity of the relationship between my office and the agencies in the conduct of the inspections, and thank both agencies for their cooperation during those inspections. Responses to the recommendations made in inspection reports provided to the agencies have been positive.

I am also pleased to report that both agencies have implemented procedural reviews, at least in part as a result of the issues raised in my inspections, and my staff have been able to provide input into those reviews. I am confident that this aspect of my office's activities will lead to continued improvements in the management of controlled operations. These reviews also provide a valuable opportunity for my staff to review the inspection methodology and improve their understanding about the conduct of controlled operations.

Inspections of Controlled Operations Records

The Act requires my office to inspect the records of the AFP and the ACC in relation to controlled operations at least once every 12 months. Essentially, my task is of a compliance audit nature and to establish whether the requirements specified in Part IAB of the Crimes Act (regarding the authorisation, conduct and reporting of controlled operations) were complied with.

Inspection Period

My staff inspected records of controlled operations activities undertaken by the agencies in the period 1 July 2002 to 31 July 2003 (the inspection period). Two inspections of each agency were undertaken, of records generated in the periods 1 July to 31 December 2002, and 1 January to 31 July 2003.

Inspections occurred at the ACC's Sydney office on 28 March and on 25 August 2003. No inspections occurred at any of the ACC state offices during the inspection period.

Inspections of the AFP's records occurred at AFP Headquarters in Canberra between 19 and 23 May 2003, and between 1 and 3 October 2003. No regional inspections occurred during the inspection period.

The number of records inspected for each agency is shown in the table below:

	First Inspection	Second Inspection
ACC	0	3
AFP	30	30

Records for operations still ongoing at the time of the inspection are excluded from inspections under s 15(UB)(2) of the Crimes Act, and were therefore not inspected.

The inspection period was notable for the transition of National Crime Authority (the NCA) to the Australian Crime Commission. During this time, the controlled operations activity of the ACC decreased, pending the first meeting of the ACC Board, and authorisation of the ACC's new law enforcement activities.

I understand that the ACC does not use many controlled operations authorised under the Crimes Act, largely as a result of its inability to indemnify informants assisting the operation, who are persons likely to have engaged in criminal acts outside of the activities authorised in the controlled operations certificate.

This factor is not present in controlled operations legislation for each State/Territory that the ACC can access, and this is the mechanism used by the ACC for the majority of its controlled operations. This office does not

anticipate that controlled operations numbers for the ACC will increase while the Crimes Act provisions operate in their current form.

This issue arose in my briefing of the Parliamentary Joint Committee on the ACC on October 2003, and I am currently considering it to determine if the scope of my inspections should be broadened. I also propose to liaise with my State counterparts about this issue.

Inspection Methodology

The inspections ascertained the agencies' compliance with the Crimes Act's record keeping requirements for each controlled operation through an administrative review of records.

The inspection used a checklist to review the:

- conduct of the operation (s 15I);
- application for the controlled operation certificate (s 15J);
- form of the application (s 15K);
- urgent applications (s 15L);
- grounds for the issue of the certificate (s 15M);
- certificate authorising the operation (s 15N); and
- formal reports to the Minister (s15R, s15S).

Where applicable, the inspection also reviewed:

- applications to vary certificates (s 15NA);
- the surrender of the certificate (s 15O);
- applications for the termination of the operation (s 15OA);
- the period that the certificate was in force (s 15P); and
- notifications to the CEO of the Australian Customs Service (s 15Q).

Results of Inspections

I have summarised the primary findings and recommendations of each inspection of each agency under the sub-headings below. In listing my recommendations to both agencies, I am mindful that the issues identified in the inspections were areas where best practice in record keeping and strict compliance with the Crimes Act has not been achieved. I have no reason to believe that there have been any instances where a controlled operation has been undertaken when it should not have.

Annex A to this report provides the text of the recommendations as I have made them to the agencies. It also provides the agencies' responses to the recommendations.

Australian Crime Commission

The inspection of the Commission's records covered three records of controlled operations conducted under Commonwealth legislation. Three areas requiring attention were identified. In the course of preparing this report, an issue arose in the receipt of the draft report by the ACC. This delayed the finalisation of procedural fairness consultation until 12 January 2004. A review of the communication process for draft reports has been undertaken to ensure that there are no delays in future.

One certificate authorising an operation (also indemnifying the participants) did not describe the nature of the activities forming the operation, and therefore did not comply with the requirements of s 15N of the Crimes Act. This information was fully contained in the application for the certificate, but the content of the certificate proper was not sufficient to meet the Act's requirements.

Two other issues related to the preparation of 'formal reports' (quarterly and annual reports to the Minister). The inspection staff noted that the ACC was not meeting the periods of financial year quarters as described in the Crimes Act, which operate differently from normal financial year quarters.

It was also noted that the information contained in the reports was based on verbal briefings and was therefore not supported by good administrative practice, or by information that could be reviewed by the inspection team.

Three recommendations were made to the Commission. These recommendations were that the Commission should:

- ensure that Certificates authorising an operation contain all the information required under s 15N of the Crimes Act, in sufficient detail;
- align its information management and reporting systems to the reporting periods of the legislation; and
- review its administrative practices for the preparation of formal reports, and consider developing a reporting mechanism for the completion of controlled operations. Documented briefing notes should support verbal briefings.

The ACC has responded to my recommendations (at annex A) and has implemented a review of practices and procedures, which has involved appropriate consultation with my staff.

Australian Federal Police

In the course of preparing this report, the finalisation of procedural fairness consultation was delayed until 16 January 2004. This appears to have been the result of staff changes in the AFP impacting on timeframes for responding to my draft report. I have asked my staff to work closely with the AFP to ensure that reports are prepared in a timely manner.

In my last report of my office's activities for controlled operations, I informed you that I had made recommendations to ensure that there was no opportunity for ambiguity or uncertainty to arise about aspects of controlled operations conducted by the AFP.

These recommendations addressed issues including:

- More stringent record keeping around the approval and amendment processes for certificates;
- Clear and consistent identification of parties involved in each operation; and
- Maintaining consistency of reporting across formal reports about controlled operations.

While there is clear evidence that the AFP has implemented some effective quality assurance and management systems, and I have commended the AFP for the quality assurance work undertaken by the staff in the Operations Monitoring Team (OMT), similar issues were identified in this inspection year.

The AFP completed 61 controlled operations in the reporting period. In the first inspection of 30 records conducted by my staff, the AFP was assessed as substantively compliant with the provisions of the Act, with the exception of s 15M(h) (use of non-Law Enforcement Officers) and s 15N (form and content of Certificates). Other minor administrative issues were also identified in the inspection, but these were assessed as not affecting the AFP's compliance.

The second inspection found an improvement in the content of certificates authorizing controlled operations. I am aware that there was a short period between the inspections conducted this year, and for this reason, I have assessed the issues detected during the second inspection as administrative issues occurring during the transition to new templates and practices for controlled operations records.

However, I am of the opinion that the continued development of templates and the internal quality assurance reviews being undertaken by the AFP is essential for the AFP to improve its compliance with the Act. Further, these measures will not become fully effective until case officers for controlled operations received training in, and are held accountable for, the documents that they produce. This element of the AFP's compliance formed the central theme for the specific recommendations made to the AFP.

Comprehensiveness and Adequacy of Reports Provided to Parliament by Each Agency

In forming an opinion about the adequacy and comprehensiveness of the reports provided to the Parliament by each agency, I have also considered the process by which each agency prepares reports for the Minister, and the relationship between those reports and the reports that the Minister must lay before the Houses of Parliament each year.

I have noted that each agency prepares a quarterly report for the Minister (the quarterly report) to meet the requirements of s 15R and s 15S of the Crimes Act. These reports are compiled by each agency to form an Annual Report (the Agency Annual report) that is provided to the Minister.

My office understands that the Agency Annual report for the ACC is then joined to the Agency Annual report for the AFP, and forwarded to the Minister for his consideration as the Ministerial Annual Report required by s 15T of the Crimes Act.

Review of Agency Quarterly Reports

My office has received each quarterly report prepared by the Agencies. These reports were compared with the information contained on each operation file (during the inspections of records discussed earlier in this report).

In all instances, the agencies have correctly reported the number and broad details of the controlled operations undertaken in each quarter.

Australian Crime Commission

Quarterly reports were provided to my office promptly by the ACC, but did not reflect the quarters defined by *the Measures to Combat Serious and Organised Crime Act 2001*. I have drawn the ACC's attention to the definition of quarter in subsection 9 of the Measures to Combat Serious and Organised Crime Act, which amended paragraph 3(1) of the *Crimes Act 1914*. For the purposes of formal reporting, quarters are calculated at three-month periods ending:

- 31 January;
- 30 April;
- 31 July; and
- 31 October.

The Commission has been preparing its reports in line with the financial year quarters, and I have recommended that it aligns its reporting systems with the Act's requirements. In all other respects, the Commission's quarterly reports have been assessed as adequate and comprehensive.

Australian Federal Police

The review of the AFP quarterly reports identified some instances where there were minor discrepancies between the operational files and the information provided in the reports. Minor discrepancies were observed between the quarterly report table, the quarterly report content and operation effectiveness reports during the inspection. In all cases, these appeared to result from administrative errors, which in turn can be attributed to issues of staff turnover and resource constraints during the preparation of the quarterly reports.

Overall, the structure and templates content of the reports was assessed as adequate and comprehensive. An issue was detected about the inclusion of information that may jeopardise the operation. Some operations requested that certain information not be included in formal reports, but it was included in the quarterly reports. This may pose some risk of the information being further captured in the annual reports, but the issues have not been assessed further.

Review of Ministerial Annual Reports

The Act provides at s 15UC that I should report on my activities to the Parliament as soon as practicable after 30 June of each year, but the annual reports on controlled operations prepared by the Minister under s 15T are not received by this office until late in the calendar year. I have asked my inspection team to ensure that reports of inspections are prepared promptly, and not delayed until annual reports are available.

For this reason, I have not reported on the adequacy and comprehensiveness of the annual report in this report. My inspection staff will review the annual report during the first inspection of the next calendar year, when they inspect records generated in the period 1 August 2003 to 30 April 2004.

Prof. John McMillan
Commonwealth Ombudsman

Annex A: Recommendations and Agency Responses

Australian Federal Police

First Inspection

Recommendation 1: The AFP should ensure that the reasons for the use of non-Law Enforcement Officers (LEOs) in an operation are explicitly stated in the Grounds of Issue document. There may be instances where there are known barriers to achieving cooperation with an agency involved in the operation and where this is the case, the AFP should ensure that the reasonableness of using non-LEOs is still assessed on a case-by-case basis. The AFP may wish to consider providing a briefing on these barriers to Ombudsman inspection staff at the commencement of each inspection.

AFP Response: It was agreed that the role assigned to non-LEO's involved in the operation and the reason why that role could not be adequately performed by a law enforcement officer should be included in the grounds for issue document. This is in accordance with section 15M (h).

AFP Action: This recommendation will be communicated to all members involved in controlled operations. It is anticipated there will be an improvement in the inclusion of this type of detail. Members of the Operations Monitoring Team (OMT) will continue to monitor documentation in relation to controlled operations.

Recommendation 2: The AFP should amend the templates for the *Certificate Authorising a Controlled Operation* to ensure that all of the information required under section 15N of the Act is included, to a sufficient detail.

AFP Response: Members of the OMT advise that the template for the certificate provides sufficient prompts to cover section 15N (cb) and section 15N (cc). The templates for the certificates clearly mention to list the full name of the civilian participants and their role in the controlled operation.

AFP Action: At this stage the AFP will monitor the application and use of the current templates and if necessary at a future point in time amend the templates. The issue raised in the recommendation will be communicated to all members involved in controlled operations. It is anticipated there will be an improvement in the inclusion of this type of detail. Members of the Operations Monitoring Team will continue to monitor documentation in relation to controlled operations. It should be noted that the quality of controlled operations documentation is being critically examined as part of the AFP's internal Business Activity Analysis.

Recommendation 3: The AFP should ensure that a consistent approach to the identification of non-LEOs and their roles in the documents authorising an operation is taken, and that non-LEOs are appropriately identified in the certificate.

AFP Response: The AFP has processes and procedures in place, which provide a consistent approach to the identification of non-LEOs. Inspection staff were provided with a complete description of the codes utilised by the AFP to describe types of human sources and an explanation as to the process that enables the Commissioner to identify a person from an assumed identity or code.

AFP Action: Members of the Operations Monitoring Team will continue to monitor controlled operations documentation to ensure correct codes are utilised.

Recommendation 4: The AFP should develop clear lines of accountability and responsibility outside the Operations Monitoring Unit to ensure that templates are used when applying for and administering controlled operations.

AFP Response: This issue has been raised with the Director of Outcome Service Delivery. Greater oversight of controlled operations documentation has been introduced in the AFP Sydney Office following the Business Activity Analysis that was conducted in June 2003.

AFP Action: This recommendation will be communicated to all Operations Monitoring Centres (OMCs). It is anticipated that a formalised request for a dedicated controlled operations officer in each OMC will be developed and raised at the Director of Operations forum.

Follow-up response: Further to this, in December 2003, an OMT proposal was accepted that a three person committee be convened for all Controlled Operations requests in each regional office or functional stream. This has received approval from the Deputy Commissioner and will be implemented immediately with similar methodology to existing review procedures for Telecommunication Intercept and Listening Devices affidavits.

Recommendation 5: The AFP should advise all Authorising Officers that the practice of backdating the termination certificate is questionable and not to be continued until such time as settled legal advice has been received on the issue.

AFP Response: This has been noted by members of the OMT.

AFP Action: A minute advising all Authorising Officers of the above issue has been disseminated.

Recommendation 6: The Operations Monitoring Unit should provide an audit trail of their scrutiny of operation duration for operations extended through variation by annotating the variation certificate, in order to ensure that operations are not extended beyond review timeframes without undergoing review.

AFP Response: As noted by the inspecting staff the AFP has received conflicting legal advice regarding extending the duration of a controlled operations certificate by a variation certificate. All staff involved with controlled operations have noted this advice and the practice of extending the duration of controlled operations certificates is no longer utilised. The legislation defines any controlled operation that continues for more than three months as a major controlled operation which must be authorised by the Commissioner or Deputy Commissioner. If the major controlled operation continues for more than three months, a review must be conducted by a member of the Administrative Appeals Tribunal during the last two weeks of the period of three months after the day on which the certificate was given. As such, the legislation does not permit a variation to extend the duration of a controlled operation beyond three months, as any operation that continues for more than three months is a major controlled operation and a new application, grounds for issue and certificate would need to be issued.

AFP Action: The OMT will continue to monitor all major controlled operations ensuring reviews are conducted within the legislative timeframes.

Recommendation 7: The AFP should develop the Effectiveness Report process and proforma to report broadly on the effectiveness of the operation, in addition to the information already required by the Act, which goes to the specific conduct of the operation.

AFP Response: The AFP reports broadly on the effectiveness of controlled operations. Information regarding seizures, warrants executed and persons apprehended deal with the specific conduct of the warrant. In addition, the AFP has internal processes in place which examines the effectiveness of it's investigations.

AFP Action: The OMT will continue to monitor controlled operation documentation to ensure Effectiveness Reports broadly report on the effectiveness of controlled operations.

Recommendation 8: The AFP should consider reviewing the management of controlled operations ERs against the work already done by the Telecommunications Interception Division of the AFP, to ensure that *Final Effectiveness Reports* on telecommunication interceptions are prepared to the required standard.

AFP Response: It is agreed that there is a varying level of comprehensiveness in controlled operations effectiveness reports.

AFP Action: Members of OMT will consult with TID to discuss the issue raised.

Recommendation 9: The AFP should add a checkbox to effectiveness report templates to indicate if the release of information about a person in formal reports could jeopardise the operation

AFP Response:

Under the heading of 'Future of on-going investigation' within the effectiveness report there is a prompt which states "*Include whether the publication in the Annual Report to Parliament of any of these details might jeopardise on-going investigations*". It is suggested that the above provides sufficient information to case officers.

AFP Action: No action is required

Second Inspection

Recommendation 1: The AFP should develop and implement a program of training for case and authorised officers in aspects of controlled operations documentation.

AFP Response: Following ongoing consultation with the Ombudsman Reviewing Team, three training packages are currently under development catering for operation members, reviewing officers and authorising officers.

AFP Action: In conjunction with the Training packages, existing AFP guidelines are also being reviewed to ensure increased accountability and improved management systems.

Recommendation 2: The AFP should ensure that case officers receive training about the indemnity offered by certificates, and that accountability frameworks are developed to ensure that certificates are correctly prepared.

AFP Response: This issue is well documented and has been highlighted by the OMT's internal review.

AFP Action: In conjunction with the Training packages, existing AFP guidelines are also being reviewed to ensure increased accountability and improved management systems.

Recommendation 3: The AFP should ensure that all certificates issued to indemnify confidential sources provide sufficient detail to allow the identification of the person with the false name or code.

AFP Response: Some certificates clearly identify the existence and use of human sources or under cover operatives. There is no requirement to include this information on a Certificate. Whilst the impact of identifying UCOs may be a case by case basis there should never be an identification of a human source on a certificate. The consequence of this when the document is produced in court is self explanatory.

AFP Action: In conjunction with the Training packages, existing AFP guidelines are also being reviewed to ensure increased accountability and improved management systems.

Recommendation 4: The AFP should ensure that case officers receive training about the indemnity offered by certificates, and that accountability frameworks are developed to ensure that certificates are correctly prepared.

AFP Response: As mentioned above and at recommendation 4 following the first inspection, training packages are being developed , the recommending committee is being utilised following endorsement by the Deputy Commissioner and a Management Accountability checklist will be used in conjunction with the committee.

AFP Action: In conjunction with the Training packages, existing AFP guidelines are also being reviewed to ensure increased accountability and improved management systems.

Australian Crime Commission

Recommendation 1: The ACC should ensure that *Certificates Authorising a Controlled Operation* contain all the information required under s 15N of the Act, to a sufficient detail.

ACC Response: The comments are noted and every effort will be made toward future compliance.

Recommendation 2: The ACC should align its information management and reporting systems to the reporting periods of the legislation.

ACC Response: Formal reporting has been moved to align with statutory dates as per your recommendation 2. The ACC's last report to the Minister (covering the period ending 31 October 2003) complied with the statutory timetable.

Recommendation 3: The ACC should review its administrative processes for the preparation of formal reports, and consider developing a reporting mechanism for the completion of controlled operations. Verbal briefings should be supported by documented briefing notes.

ACC Response: In relation to formal reports, the subject of recommendation 3, the process has been reformed such that they are now drafted in the first instance by the various Applicants/Case Officers. Each report is then reviewed by the ACC legal officer and approved by the ACC Director National Operations (who in most cases is the Authorising Officer).