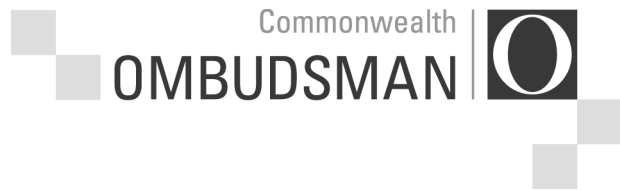


**A report on the
Commonwealth Ombudsman's
activities in monitoring
controlled operations**

**AUSTRALIAN CRIME COMMISSION
AUSTRALIAN FEDERAL POLICE
2012–13**

Report by the Commonwealth Ombudsman
under Part IAB of the *Crimes Act 1914*

November 2013



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INTRODUCTION

Part IAB of the *Crimes Act 1914* (the Act) prescribes the process of applying for, granting, and ending an authority to conduct a controlled operation. A controlled operation is a covert operation carried out by law enforcement officers under the Act for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious offence. The operation may result in law enforcement officers engaging in conduct that would otherwise constitute an offence.

Given the extraordinary powers Part IAB of the Act grants law enforcement agencies, under s 15HS of the Act, the Commonwealth Ombudsman is required to inspect the controlled operations records of the Australian Crime Commission (ACC), the Australian Federal Police (AFP) and the Australian Commission for Law Enforcement Integrity (ACLEI) at least once every 12 months to determine the extent of compliance with Part IAB of the Act. The Ombudsman must also inspect the records of the ACC to determine the extent of compliance with corresponding state controlled operations laws, if it has used them.

Section 15HO of the Act requires the Ombudsman to submit a report to the Minister for Justice (the Minister) as soon as practicable after 30 June each year on the work and activities of the preceding 12 months.

Content of this report

This report covers the Ombudsman's work and activities in monitoring controlled operations between 1 July 2012 and 30 June 2013 and includes:

- an overview of the methodology used to assess compliance with Part IAB of the Act
- an assessment of compliance for the ACC and the AFP.

No inspections were conducted of ACLEI between 1 July 2012 and 30 June 2013, as ACLEI advised that it did not undertake any controlled operations under the Act. Similarly, no inspections were conducted of the ACC's activities under corresponding state controlled operations laws in this period as the ACC advised that it did not use corresponding state controlled operations laws.

Overview of agency compliance

Based on the records inspected, we assessed the ACC and the AFP as compliant with the majority of the requirements of Part IAB of the Act. Both agencies showed a strong culture of compliance and a high standard of record keeping.

In particular, we noted the measures taken by the AFP to address our previous recommendations and findings, including undertaking a review of its practices to identify ways to improve compliance with Part IAB.

We identified a number of areas where improvements may be made by both the ACC and the AFP. Further details are provided in the table below and under the sections on each agency.

| Criteria | ACC | | AFP | |
|--|---|---|---|---|
| | First inspection | Second inspection | First inspection | Second inspection |
| 1. Were applications for authorities properly made and authorities properly granted? | Compliant, with a suggestion made to better demonstrate compliance with ss 15GH(4) and 15GI(2). | Compliant. | Compliant with the exception of four authorities. | Compliant with minor exceptions. |
| 2. Were applications for variations to authorities properly made to and decided by appropriate authorising officers? | N/A | Compliant. | Compliant. | Compliant with minor exceptions. |
| 3. Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members? | N/A | N/A | Compliant with the exception of five applications for variations. | Compliant. |
| 4. Were the reported activities covered by the authorities? | Nothing to indicate otherwise. | Nothing to indicate otherwise. | Nothing to indicate otherwise with the exception of six authorities where we were unable to determine compliance. | Compliant ¹ with one exception. Two authorities where we could not determine compliance. One administrative error noted. |
| 5. Were authorities properly cancelled? | Compliant. | Compliant. | Compliant with the exception of one authority. | Compliant. |
| 6. Were reports properly made and the required records kept by the agency? | Compliant, with one administrative error noted. | Compliant, with one administrative error noted. | Compliant, with some minor issues noted with the general register. | Compliant with minor exceptions. |

1 'Compliant' in this context should be interpreted as 'nothing to indicate otherwise'.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The primary purpose of our inspections is to ascertain whether agencies have complied with the requirements of Part IAB of the Act, which relates to the authorisation, conduct and reporting of controlled operations.

Under the Act, we are required to conduct at least one annual inspection of each law enforcement agency. Due to the large number of controlled operations and the associated records, it is our practice to conduct two inspections of each law enforcement agency per financial year. This ensures that issues can be quickly identified and addressed.

For security reasons, we do not inspect records relating to ongoing controlled operations. Instead, we inspect:

- authorities to conduct controlled operations that expired within the inspection period
- authorities to conduct controlled operations that were cancelled within the inspection period.

Authorities are internally issued to ACC and AFP investigators by authorised officers in each agency.

Inspections of the records held by the ACC and the AFP were conducted on the following dates.

Table 1: Dates and periods of inspections

| AGENCY | FIRST INSPECTION PERIOD Records from 1 January to 30 June 2012 | SECOND INSPECTION PERIOD Records from 1 July to 31 December 2012 |
|--------|--|--|
| ACC | 23 October 2012 | 8 April 2013 |
| AFP | 29 to 31 October 2012 | 16 to 18 April 2013 |

We inspected all 108 authorities that expired or were cancelled in 2012, as detailed in the table below.

Table 2: Number of authorities inspected

| AGENCY | FIRST INSPECTION PERIOD Records from 1 January to 30 June 2012 | SECOND INSPECTION PERIOD Records from 1 July to 31 December 2012 |
|--------|--|--|
| ACC | 3 of 3 authorities were inspected | 2 of 2 authorities were inspected |
| AFP | 58 of 58 authorities were inspected | 45 of 45 authorities were inspected |

Inspection methodology

The inspections assessed whether:

- applications for authorities to conduct controlled operations were properly made and authorities were properly granted
- applications for variations to authorities to appropriate authorising officers were properly made and decided
- applications for variations to authorities to nominated members of the Administrative Appeals Tribunal (AAT) were properly made
- the reported activities were covered by the authorities
- cancellations of authorities were properly made
- reports were properly made and the required records were kept by the agency.

AUSTRALIAN CRIME COMMISSION

The ACC's progress in addressing previous findings

As a result of our inspections during 1 July 2011 to 30 June 2012, we identified that an application for an authority did not refer to previous authorities that appeared to relate to the same criminal activity.

No further instances were noted at this inspection.

Discussion of 2012–13 main inspection findings

No major issues were identified as a result of the inspections.

We made one best practice suggestion to the ACC on how to better demonstrate compliance with ss 15GH(4) and 15GI(2) of the Act. These provisions stipulate the information with which an authorising officer must be reasonably satisfied in order to grant an urgent authority. The ACC advised that it had developed templates and updated its Standard Operating Procedures in response to this suggestion.

Comprehensiveness and adequacy of reports

Section 15HO(4) of the Act requires the Ombudsman to comment on the comprehensiveness and adequacy of the reports provided to it by the Chief Executive Officer of the ACC under ss 15HM and 15HN.

Six-monthly reports

Under s 15HM, the ACC is required to submit six-monthly reports to the Ombudsman as soon as practicable after 30 June and 31 December each year. The six-monthly reports must include details on controlled operations for which the ACC was the authorising agency during the previous six months (ss 15HM(2), (2A), (2B), (2C) and (3)).

The ACC submitted its first six-monthly report in August 2012 for the period 1 January to 30 June 2012 and the second report in April 2013 for the period 1 July to 31 December 2012. Both reports provided comprehensive and accurate records on the controlled operations authorised by the ACC in 2012.

Annual report

Under s 15HN, as soon as practicable after 30 June each year, the ACC is required to submit a report to the Minister setting out the details required by ss 15HM(2), (2A), (2B) and (2C) in relation to controlled operations for which the ACC was the authorising agency during the previous 12 months. Under ss 15HN(2) and (4), the ACC may advise the Minister to exclude information from the annual report if the information may, for example, endanger a person's safety or prejudice an investigation.

The AFP published an annual report in September 2012, which included a report on the records of the ACC's controlled operations. The part of the annual report relevant to the ACC provided comprehensive and accurate records of the controlled operations authorised by the ACC in 2012. The report also appeared to be consistent with the information provided by the ACC in its six-monthly reports.

It also appeared that the ACC's advice to the Minister to exclude information from the annual report was made in accordance with ss 15HN(2) and (4).

AUSTRALIAN FEDERAL POLICE

The AFP's progress in addressing previous findings

One recommendation was made to the AFP as a result of our inspections during 1 July 2011 to 30 June 2012.

Previous Recommendation:

We recommend that the Australian Federal Police provides appropriate guidance to relevant staff to ensure that the correct expiry dates are stated on authorities to conduct controlled operations and on any extensions to such authorities. It may wish to highlight that the period of validity of an authority includes the date the authority was granted.

Two further instances of incorrect expiry dates being noted on authorities were self-disclosed by the AFP at the first AFP 2012–13 inspection.

In response to this issue, the AFP reviewed its administration of controlled operations and as a result, implemented an electronic calculator to automatically calculate expiry dates. The AFP has also issued explanatory guidance for officers to ensure expiry dates are accurately calculated.

We acknowledge that these processes were implemented towards the end of 2012 and the effects of these changes may not be seen until we inspect the AFP's records in the second half of 2013.

A number of other issues were identified as a result of our inspections during 2011–12, including:

- issuing a new authority rather than applying to the AAT to extend a major controlled operation beyond three months
- keeping insufficient records, so we were unable to determine whether reported activities were covered by an authority
- not making a written record of an urgent authority within seven days of it being granted
- making an urgent application for a controlled operation where the previous application was also urgent.

The AFP implemented a number of measures to address these issues. However, further issues relating to applications for urgent authorities and conducting activities in accordance with an authority were noted at the 2012–13 inspections. These issues are discussed below.

Discussion of 2012–13 main inspection findings

Period of validity of authorities (first AFP 2012–13 inspection)

The AFP self-disclosed that it issued two authorities which were granted for a period of three months and one day, contrary to the maximum period of three months permitted by s 15GK(1)(h) of the Act. The AFP implemented a range of administrative processes to address this issue, including:

- introducing an electronic calculator to automatically calculate expiry dates
- including a calendar and advice on how to accurately calculate expiry dates in the application template for a controlled operation authority
- issuing aide memoirs to prompt authorising officers to specifically consider whether the expiry date is correct when approving authorities.

This issue was not noted at the second AFP 2012–13 inspection.

Applications for urgent authorities not compliant with the Act (first AFP 2012-13 inspection)

Section 15GH(4)(b) of the Act requires an application for an authority to state whether or not the proposed controlled operation, or any other controlled operation with respect to the same criminal activity, has been the subject of an earlier application for an authority.

'Criminal activity' is not defined in the Act. In our view, for the purpose of s 15GH(4)(b), criminal activity captures the same or similar criminal offence which was committed in a similar manner by the same or related targets. This approach informs an authorising officer, when considering an application, the extent that controlled operations have been used in the investigation of related crimes and targets.

In addition, s 15GH(3) of the Act stipulates that if an urgent application has been made for a controlled operation, the subsequent application for an authority to conduct the same controlled operation must be a formal application.

The AFP issued two urgent authorities on the same day in relation to the same criminal activity, which involved the same controlled conduct and had common targets. However, at the time of the application, the AFP did not consider the urgent authorities to be in relation to the same criminal activity.

We considered that there were sufficient similarities and connections in the nature and prescribed conduct to conclude that both authorities were in relation to the same criminal activity. As a consequence, the AFP did not state that the second proposed controlled operation had previously been the subject of an urgent authority, as required by s 15GH(4)(b), and it made two consecutive applications for urgent authorities, contrary to s 15GH(3).

Subsequent to the inspection, the AFP confirmed that both authorities were related to the same criminal activity and that the applicant for the second urgent authority should have sought a variation to the first urgent authority, instead of applying for a new authority.

We suggested that the AFP reinforce the need for applicants to consider whether the criminal activity for which an authority is sought has been the subject of a previous authority, and if so, ensure that where the previous application for an authority was urgent, that the subsequent application must be formal.

In response to this suggestion, the AFP advised that it is developing training packages for relevant staff to mitigate this risk in the future.

The AFP further advised that it has informed investigators and authorising officers of our view regarding criminal activity and will incorporate this view in future training to staff.

Conducting activities in accordance with authorities (first and second AFP 2012–13 inspections)

The controlled operations regime was established to protect participants in a controlled operation from criminal responsibility. Section 15HA of the Act provides protection if the participant engages in conduct in accordance with an authority.

The AFP requires its law enforcement participants to complete an effectiveness report within five days of the expiry or cancellation of an authority. The effectiveness report is required to identify the controlled operation, provide information in relation to the controlled conduct engaged in during the operation and detail any narcotic goods involved.

The effectiveness reports along with participant case notes provide the best available evidence to demonstrate whether AFP participants engaged in conduct in accordance with the authority.

From an examination of the information contained in the effectiveness reports and case notes at both inspections, nothing indicated that the AFP had not complied with the authorities in the majority of cases. However, two issues were noted.

First, in the course of carrying out our Law Enforcement Ombudsman role under the *Australian Federal Police Act 1979*, we identified one instance where a law enforcement participant engaged in conduct that was not covered by the authority.

The AFP's records indicated that the law enforcement participant self-disclosed the incident to their immediate supervisor, recognising that they had acted outside the authority to conduct the controlled operation. The participant was then precluded from acting under the authority via a variation to the authority.

This matter was known by the AFP prior to the inspection. However, a breakdown in internal communication resulted in this matter not being included in the effectiveness report for the controlled operation nor disclosed to us by the area we usually liaise with for inspection purposes. The AFP advised that it has strengthened internal communication between the two business areas to prevent this from occurring in the future.

Second, at both inspections we were also unable to determine if the AFP had engaged in conduct in accordance with eight authorities due to insufficient records.

In response to this issue, the AFP advised that it has updated its effectiveness report template to record more specific information regarding the conduct undertaken by participants. The AFP further advised that it has developed a manual for staff who quality assure draft documents to ensure that sufficient information is provided in the effectiveness reports.

Comprehensiveness and adequacy of reports

Section 15HO(4) of the Act requires the Ombudsman to comment on the comprehensiveness and adequacy of the reports provided to it by the Commissioner of the AFP under ss 15HM and 15HN.

Six-monthly reports

Under s 15HM, the AFP is required to submit six-monthly reports to the Ombudsman as soon as practicable after 30 June and 31 December each year. The six-monthly reports must include details on controlled operations for which the AFP was the authorising agency during the previous six months (ss 15HM(2), (2A), (2B), (2C) and (3)).

The AFP submitted its first six-monthly report in July 2012 for the period 1 January to 30 June 2012 and the second report in February 2013 for the period 1 July to 31 December 2012. Apart from some minor administrative errors, both reports provided comprehensive and accurate records of the controlled operations authorised by the AFP in 2012.

Annual report

Under s 15HN, as soon as practicable after 30 June in each year, the AFP is required to submit a report to the Minister setting out the details required by ss 15HM(2), (2A), (2B) and (2C) in relation to controlled operations for which the AFP was the authorising agency during the previous 12 months. Under ss 15HN(2) and (4), the AFP may advise the Minister to exclude information from the annual report if the information may, for example, endanger a person's safety or prejudice an investigation.

As stated above, the AFP published an annual report in September 2012. The part of the report relevant to the AFP provided comprehensive and accurate records of the controlled operations authorised in 2012. The report also appeared to be consistent with the information provided by the AFP in its six-monthly reports. However, we identified inconsistencies between the statistical table in the annual report and the corresponding six-monthly reports. The AFP advised that it has implemented processes to address this issue in the future.

It also appeared that the AFP's advice to the Minister to exclude information from the annual report was made in accordance with ss 15HN(2) and (4).

Colin Neave
Commonwealth Ombudsman