



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

**CONDUCTED BY THE AUSTRALIAN CRIME COMMISSION
AND THE AUSTRALIAN FEDERAL POLICE**

Report by the Commonwealth Ombudsman Prof. John McMillan
under Part 1AB of the *Crimes Act 1914*

2003-04



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INTRODUCTION

This report has been prepared by my office under section 15UC of the *Crimes Act 1914* (the Act), which requires that I provide an annual report of my work and activities in monitoring controlled operations in the period 1 July 2003 to 31 July 2004 (the reporting period). It has two main parts.

The first describes my office's inspections of records held by the Australian Federal Police (AFP) and the Australian Crime Commission (ACC) under section 15UB of the Act. The second provides an overview of my activities in forming an opinion about the adequacy and comprehensiveness of the reports provided to Parliament by those law enforcement agencies.

I have been pleased by the progress of both agencies in improving compliance and their administrative practices, and thank them for their cooperation during the inspections. Both agencies have continued to review their practices and procedures, at least in part because of the issues raised in my inspections, and my staff have contributed to those reviews. I am confident that this aspect of my office's activities will lead to continued improvements in the management of controlled operations.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The Act requires my office to inspect the records of the AFP and the ACC at least once every 12 months. Essentially, my task is of a compliance audit nature, to ascertain whether the agencies have complied with requirements specified in Part 1AB of the Act (relating to the authorisation, conduct and reporting of controlled operations).

My staff inspected records of controlled operation activities undertaken by the agencies under Part 1AB of the Act in the period 1 July 2003 to 31 July 2004 (the inspection period). Two inspections of each agency were undertaken of eligible records within the periods 1 July 2003 to 31 January 2004, and 1 February to 31 July 2004.

Inspections occurred at the ACC's Sydney office in April and August 2004. Inspections of the AFP's records occurred at AFP Headquarters in Canberra in March/April and August/September 2004.

The number of records inspected for each agency is shown in the table below. Records for controlled operations identified by the agencies as still ongoing at the time of the inspection are excluded, and will be inspected when the controlled operation has concluded.

Table 1: Number of records inspected

AGENCY	FIRST INSPECTION	SECOND INSPECTION
ACC	9	9
AFP	15	24

Inspection methodology

Overview

Over the past eight months, an extensive review of my office's inspection methodology has led to the development of new guidelines and instructions for the inspection team, and the development of new checklists to assist in the process. A legally qualified staff member of the office has undertaken the review and the new documents were tested during the inspections.

Change to the inspection period

The methodology review has changed the inspection period to align it with an amendment of the Act in 2001. Part 1AB of the Act was amended by the *Measures to Combat Serious and Organised Crime Act 2001*, which:

- broadened the controlled operations provisions to include a 'serious Commonwealth offence'
- introduced immunity from criminal liability and indemnity from civil liability for law enforcement officers and other persons where certain conditions are met, and
- introduced accountability measures such as reporting requirements and external monitoring of controlled operations by this office.

The amendments required the AFP and ACC to prepare reports to the Minister within two weeks after the end of each quarter, and to provide a copy of the report to this office. Quarters were defined as three-month periods ending 31 January, 30 April, 31 July, and 31 October.

Under the previous methodology, my office conducted two inspections to review records for six-month periods predicated on the traditional financial year. The first inspection reviewed records generated between 1 July and 31 December of the previous year, and the second inspection considered records generated between 1 January and 30 June of the current year.

Under the new methodology, the records of the AFP and ACC will be inspected following the 'new quarters'. The first inspection will review records generated between 1 August and 31 January, while the second will inspect records generated between 1 February and 31 July. Figure 1 below illustrates this change.

Figure 1: Change to the 'inspection period'

Previous methodology											
Inspection period 1						Inspection period 2					
Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
Inspection period 1						Inspection period 2					
New methodology											

Methodology

The inspection considers two elements of controlled operations:

- (a) the agencies' compliance with Part 1AB of the Act, and
- (b) the comprehensiveness and adequacy of quarterly reports submitted by the agencies to the Minister and the annual report presented by the Minister to the Parliament.

Compliance with Part 1AB

The agencies' compliance with Part 1AB of the Act is ascertained across all eligible records within the inspection period, utilising a checklist to review the following:

- application for a controlled operation certificate (section 15J)
- form of the application (section 15K)
- grounds for the issue of the certificate (section 15M), and
- certificate authorising the operation (section 15N).

Where applicable, the inspection also reviewed:

- urgent applications (section 15L)
- applications to vary certificates (section 15NA)
- the surrender of a certificate (section 15O)
- the termination of a certificate (section 15OA)
- applications to a nominated Tribunal member for the review of a certificate (section 15OB)
- the period that the certificate was in force (section 15P), and
- notifications to the Chief Executive Officer (CEO) of the Australian Customs Service (section 15Q).

This aspect of the inspection also reviews whether the agencies are implementing best practice in their processes and procedures.

Comprehensiveness and adequacy of reports

The comprehensiveness and adequacy of **quarterly reports** is inspected by:

- (a) checking that the requisite information is included in the reports (sections 15R and 15S), and

- (b) comparing the information contained in the reports against the information contained in the files to determine accuracy and comprehensiveness.¹

The comprehensiveness and adequacy of the **annual report** is inspected by:

- (a) checking that the requisite information is included in the report (section 15T), and
- (b) comparing the information contained in the report against the information contained in the quarterly reports and files for accuracy and comprehensiveness.²

INSPECTION RESULTS

These results reflect the overall assessment of each agency's compliance with relevant sections of the Act for the inspection year, based on the results of the two inspections conducted. **Annex A** of this report provides the recommendations that I have made to each agency, together with the agencies' responses to the recommendations.

The inspections noted a high degree of compliance with the Act by both agencies. Issues identified in the inspections were areas where best practice in record keeping and strict compliance with the Act had not been achieved.

Australian Federal Police

While two inspections were carried out during the inspection period, a single report, consolidating the results of the two inspections, was provided to the AFP. This occurred because the report of the results of the first inspection was not finalised before the start of the second inspection.

The AFP was assessed as:

- (a) complying with the requirements of Part 1AB of the Act, and
- (b) providing comprehensive and adequate information in the quarterly and annual reports.

My inspections this year have seen a significant improvement in the quality of the AFP's documentation and its compliance with the Act, particularly due to its recently introduced quality assurance processes.

¹ This is a reference to the files prepared by the agencies for inspection by this office.

² See footnote 1.

The full impact of the AFP's quality assurance measures will be visible in the next round of inspections in 2005. However, there is a need for continued scrutiny of the information contained in the controlled operations documentation concerning:

1. more comprehensive records for:
 - the application, approval and ending of controlled operations
 - notices to the CEO of Customs under section 15Q of the Act
2. clear and unambiguous identification of parties involved in each operation (particularly civilian participants), and
3. consistency in formal reports about controlled operations.

I commend the AFP on its demonstrated initiative and willingness to develop strategies to improve compliance and achieve administrative best practice.

Australian Crime Commission

Two reports were provided to the ACC based on the inspections carried out in the inspection period. The ACC was assessed in both reports as:

- (a) complying with the requirements of Part 1AB of the Act, and
- (b) providing comprehensive and adequate information in quarterly and annual reports.

In most instances, inconsistencies identified in controlled operations documentation were of a minor administrative nature and did not affect the validity of the certificates or compliance with the Act. The main issues identified by my office over the year were the continued need for:

1. comprehensive record keeping for:
 - the application, approval and ending of controlled operations
 - notices to the CEO of Customs under section 15Q of the Act, and
2. comprehensive reporting in quarterly reports.

In the first inspection, the overall assessment of the ACC's performance was that the substantive requirements of section 15L were met. Some minor deficiencies were identified in documentation associated with an urgent application, but were not considered to be significant.

My office raised some concerns with the ACC about the detail of information in quarterly reports. One issue has not yet been resolved, as the ACC and my office have differing views on the interpretation of subsection 15S(5) of the Act.

However, I am pleased with the professional approach displayed by the ACC in taking interim steps to rectify the issue pending further legal advice.

The second inspection noted a very high degree of compliance with the Act and significant improvements in administrative best practice. I commented to the ACC that the quality of documentation was high and that the quality assurance role performed by ACC lawyers has improved the ACC's ability to meet the requirements of the Act.

I am very pleased with the improvements made by the ACC in the last twelve months and have commended it on its demonstrated initiative and willingness to develop strategies to improve compliance and achieve administrative best practice.

Prof. John McMillan
Commonwealth Ombudsman

ANNEX A: RECOMMENDATIONS AND AGENCY RESPONSES

Australian Federal Police

Recommendation 1:

The Australian Federal Police should ensure that sufficient information is provided to decision makers, to enable the decision maker to reach a decision that he or she is reasonably satisfied of the matters set out in paragraphs 15M(b), (d), (e), (h) and subparagraphs 15M(f)(i) and (iv) of the *Crimes Act 1914*, in approving an application for a certificate or request for review.

AFP response: The Australian Federal Police accepts and has implemented this recommendation. Quality Assurance mechanisms are now in place to ensure this recommendation is adhered to. This subject is comprehensively covered in the controlled operations training package currently being delivered to operational members around Australia. The Operations Performance Monitoring and Analysis Team (the OPMA Team) will continue to monitor compliance with this recommendation.

Recommendation 2:

Where controlled operation documentation is lost or destroyed, the Australian Federal Police should ensure that the records inspected by the Office of the Commonwealth Ombudsman contain a comprehensive written explanation by the AFP of the loss or destruction, detailing:

- (a) the name of the person who destroyed the document, and
- (b) the full circumstances surrounding the destruction of the document (including the reason it was destroyed).

AFP response: The destruction of a controlled operation document inadvertently occurred on one occasion. A written explanation by the Australian Federal Police was placed on file. This information did contain the name of the person who destroyed the document and information as to how the document was destroyed.

The Australian Federal Police acknowledges this recommendation. It will be monitored on a case-by-case basis to take account of those instances where the matter may need to be referred to the AFP's Professional Standards area for investigation. Original controlled operation documents are now securely maintained by the Controlled Operations Registrar to prevent incidents such as this occurring. This recommendation has also been comprehensively covered in the controlled operations training package currently being delivered to operational members around Australia.

Recommendation 3:

Where controlled operations involve illicit goods that are likely to be dealt with by the Australian Customs Service, the Australian Federal Police should ensure that records inspected by the Office of the Commonwealth Ombudsman specify the decision made by the applicant (whether or not to issue a section 15Q notice) and reason(s) for the decision.

AFP response: The Australian Federal Police accepts this recommendation. Quality assurance mechanisms are now in place to ensure this recommendation is adhered to. This subject will be comprehensively covered in the controlled operations training package currently being delivered to operational members around Australia.

Recommendation 4:

The Australian Federal Police should ensure that its training program reinforces the need for controlled operation documentation (including effectiveness reports) to contain clear and unambiguous information, particularly when detailing the involvement of civilian participants.

AFP response: The Australian Federal Police accepts and has implemented this recommendation. Quality assurance mechanisms are now in place to ensure this recommendation is adhered to. This subject will be comprehensively covered in the controlled operations training package currently being delivered to operational members around Australia. The OPMA Team will continue to monitor compliance with this recommendation.

Recommendation 5:

Where civilian participants are involved in controlled operations the Australian Federal Police should ensure that the civilians are eligible for exemption from criminal liability and indemnification against civil liability by covering them in the certificate.

AFP response: This recommendation is already a practice of the AFP. Quality assurance mechanisms, including specific reference to civilian participants on the Controlled Operation Certificate template to incorporate this information, are in place that meets this recommendation.

Recommendation 6:

Where controlled operations documentation is amended after the document has been signed, for full transparency and accountability the Australian Federal Police should:

- (a) document its reason(s) for being satisfied that the amendment is valid, and
- (b) ensure that such amendments are both initialled and dated.

AFP response: The Australian Federal Police accepts this recommendation. Quality assurance mechanisms are now in place to ensure this recommendation is adhered to. This subject will be comprehensively covered in the controlled operations training package currently being delivered to operational members around Australia. The OPMA Team will continue to monitor compliance with this recommendation.

Recommendation 7:

The Australian Federal Police should ensure that applications for a certificate authorising a controlled operation state in unqualified terms whether any previous application has been made in relation to the operation, and the outcome of such an application.

AFP response: This recommendation is already a practice of the AFP. Although on one instance this did not occur, the AFP is confident through its newly established quality assurance processes that this recommendation will be met.

Recommendation 8:

The Australian Federal Police should, in its quarterly reports, identify all persons of interest listed in the application and/or certificate. Where some or all of those persons of interest are assessed as no longer being a person of interest subsequent to the application and/or certificate, the Australian Federal Police should note this in the quarterly report.

AFP response: The Australian Federal Police accepts this recommendation. Quality assurance mechanisms are now in place to ensure this recommendation is adhered to. This subject will be comprehensively covered in the controlled operations training package currently being delivered to operational members around Australia.

Recommendation 9:

The Australian Federal Police should, in its quarterly reports, clearly state whether narcotics have been destroyed and detail the chain of possession of the narcotics to ensure that it complies with the intention of paragraph 15S(2)(e) of the *Crimes Act 1914* to ensure that there is appropriate accountability and control in relation to narcotics.

AFP response: The Australian Federal Police respectfully does not agree with the Ombudsman's interpretation of section 15S(2)(e). The view of the Ombudsman's Office is that the words in the section, 'in the course of the operation' do not limit the operation of paragraph 15S(2)(e) to the controlled delivery. The AFP interpretation is that in the spirit of this particular legislation, the wording only applies to the controlled operation.

Legal advice is currently being sought. Until this advice is received, in the Controlled Operations quarterly reports to the Minister, the Australian Federal Police will continue to ensure that they clearly state whether narcotics have been destroyed and detail the chain of possession of the narcotics for the duration of the controlled operation.

The Australian Federal Police already has comprehensive monitoring and reporting requirements for narcotics outside the legislative requirements for Controlled Operations. The 'Australian Federal Police National Guideline on Drug Policy and Procedures', provides stringent accountability requirements including random audits by Internal Investigations and annual audits by Price Waterhouse Coopers, as contracted by the AFP.

Australian Crime Commission

First inspection

Recommendation 1:

The Australian Crime Commission should ensure that there is a clear link between the application and certificate for a controlled operation, to objectively demonstrate that the authorising officer was satisfied of the matters set out in section 15M of the *Crimes Act 1914*.

ACC response: The Australian Crime Commission is considering this issue as part of a review of its Policy and Procedures Manual to give clearer guidance to applicants to ensure that sufficient detail is provided.

Recommendation 2:

The Australian Crime Commission should require both applicants and authorising officers to comprehensively record the circumstances surrounding urgent applications, as soon as practicable after making an urgent application.

ACC response: The Australian Crime Commission is reviewing its Policy and Procedures Manual and templates to give more guidance to its staff in relation to urgent applications.

Recommendation 3:

The Australian Crime Commission should ensure that documents relating to urgent applications are scrutinised by Australian Crime Commission lawyers as soon as practicable after the documents are prepared.

ACC response: The Australian Crime Commission is reviewing its Policy and Procedures Manual and templates to give more guidance to its staff in relation to urgent applications.

Recommendation 4:

Where controlled operations involve illicit goods that are likely to be dealt with by the Australian Customs Service, the Australian Crime Commission should ensure that records inspected by the Office of the Commonwealth Ombudsman specify the decision made by the applicant (whether or not to issue a section 15Q notice) and reason(s) for the decision.

ACC response: The Australian Crime Commission has put procedures in place to ensure that requisite notices are contained in the files inspected by this office, and intends to amend its Policy and Procedures Manual to provide additional guidance to its staff on the application of subsections 15Q(1) and (2),

particularly in relation to the timing of the required notice to the Australian Customs Service.

Recommendation 5:

Where a controlled operation ceases prior to the expiry of a certificate, the Australian Crime Commission should ensure that the certificate is either surrendered or terminated.

ACC response: The Australian Crime Commission will review the relevant wording in its Policy and Procedures Manual to:

- (a) clarify that certificates should be surrendered when the operation ends before the expiry of the certificate, and
- (b) provide guidance to its staff on when certificates should be terminated and to develop a pro-forma notice of termination if required.

Recommendation 6:

The Australian Crime Commission should, in its quarterly reports, identify all persons targeted by an operation without using a code.

ACC response: The Australian Crime Commission is seeking further legal advice to clarify the application of section 15S of the *Crimes Act 1914*, which should assist in resolving the difference of legal interpretation to date. In any event, in the interim, the Australian Crime Commission is ensuring that all internal reports on the conduct of controlled operations identify all persons targeted by an operation without using a code.

Recommendation 7:

Where narcotics are lost during the course of a controlled operation, the Australian Crime Commission should provide an explanation from the officer(s) concerned in the Report on the Conduct of a Controlled Operation and quarterly reports that has been endorsed by the Integrity and Professional Standards area of the Australian Crime Commission to ensure transparency and accountability in relation to the narcotics.

ACC response: The Australian Crime Commission noted that the level of detail provided in the quarterly report was regarded as meeting the requirements of section 15S of the *Crimes Act 1914*, noting that additional measures are deployed to meet the requirements of the certificate regarding paragraph 15M(e), towards ensuring that to the maximum extent possible, illicit drugs would be under the control of an ACC officer at the end of the operation.

Recommendation 8:

The Australian Crime Commission should provide more comprehensive reasons for decisions to grant or refuse an application; vary or review a certificate in its

quarterly reports, except where the additional information could reasonably be expected to jeopardise the safety of any person.

ACC response: The Australian Crime Commission noted that to provide more comprehensive reasons for decisions, it would need to include more factual information in quarterly reports. This, in turn, would result in the need for the Australian Crime Commission to exclude more information from the annual report. The ACC also raised concerns that in some instances the provision of more factual information may jeopardise the safety of law enforcement participants.

Second inspection

Recommendation 1:

The Australian Crime Commission should, as a matter of good administrative practice, link offences contained in an application for a controlled operation to the definition of a serious Commonwealth offence in section 15HB of the *Crimes Act 1914* to make it clear that the offences specified are serious Commonwealth offences.

ACC response: The Australian Crime Commission will revise its Policy and Procedures Manual and associated templates to require an explicit linkage between the alleged offence and the definition of serious Commonwealth offence in section 15HB of the Act.