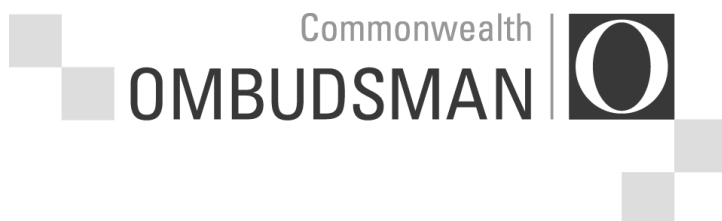


A report on the Commonwealth Ombudsman's activities in monitoring controlled operations

CONDUCTED BY THE
AUSTRALIAN CRIME COMMISSION
AUSTRALIAN FEDERAL POLICE
AUSTRALIAN COMMISSION FOR LAW
ENFORCEMENT INTEGRITY

Report by the Commonwealth Ombudsman
under Part 1AB Division 2A of the *Crimes Act 1914*

2006–07



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INTRODUCTION

Part 1AB of the *Crimes Act 1914* (the Act) prescribes the process for applying for, granting, and ending a controlled operation certificate. Where a controlled operation is authorised by such a certificate, Australian Law Enforcement Officers (ALEOs) and certain other persons are exempt from any criminal liability arising in the course of the operation and are indemnified from civil liability where certain conditions are met. Under s 15UB of the Act, the Commonwealth Ombudsman is required to inspect the controlled operations records of the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI) at least once every 12 months to ascertain their compliance with Part 1AB of the Act.

Under s 15UC(1) the Ombudsman must, as soon as practicable after 30 June each year, prepare a report of the Ombudsman's work and activities monitoring controlled operations during the preceding 12 months. Copies of the report are to be given to the President of the Senate and the Speaker of the House of Representatives for presentation to the Senate and the House of Representatives respectively. Section 15UC(2) of the Act requires that the Ombudsman's annual report to the Parliament also include comments on the comprehensiveness and adequacy of the reports provided to the Parliament by that law enforcement agency.

Timing of annual reports

Under s 15UC, the Ombudsman is required to inspect the records of law enforcement agencies under Part 1AB of the Act. Since the introduction of Part 1AB, it has been the practice of this office to conduct two inspections each calendar year and provide an annual report to the President of the Senate and the Speaker of the House of Representatives some time from November to January. This is not sufficiently proximate to 30 June as is required by the Act.

It has therefore been decided to amend the content of the annual reports, so that in future the annual reports will be provided to Parliament as soon as practicable after 30 June each year. The changes mean that this report, and future annual reports, will now detail the office's activities in monitoring controlled operations during the financial year rather than reporting on the results of inspections of agency records for the period 1 August to 31 July.

For the sake of completeness, the results of the AFP inspection in August 2006 and the ACC inspection in September 2006, which were discussed in the 2005–06 report published in December 2006, are also included in this report. It is planned to deliver the 2007–08 annual report for controlled operations in August 2008.

Content of this report

This is the sixth annual report on the Ombudsman's activities in monitoring controlled operations. This report covers the office's activities in monitoring controlled operations during the period 1 July 2006 to 30 June 2007. This report includes:

- an overview of the activities of the Ombudsman's office and the methodology used to assess compliance by law enforcement agencies with Part 1AB of the Act, as well as the methodology used to assess the adequacy and comprehensiveness of the reports provided to Parliament by those agencies through the Minister
- an assessment of compliance by law enforcement agencies with the requirements of Part 1AB of the Act and of the adequacy and comprehensiveness of the reports provided to the Minister and to Parliament by those law enforcement agencies through the Minister
- the recommendations made in the Ombudsman's reports during the inspection period and a summary of the agency responses to those recommendations.

Overview of agency compliance

During 2006–07 the AFP and ACC took further steps towards improving their compliance with the Act. In particular, both agencies improved training for staff members in the requirements of the Act, and introduced improved procedures for the management of controlled operations documentation, reporting and accountability mechanisms. Many of the issues brought to the attention of the agencies by this office have been addressed through these improvements. This office would like to thank the agencies for their continued cooperation during the inspections and their constructive response to addressing the issues identified.

ACLEI represents an addition to the inspection responsibilities of this office. Between commencing operations in December 2006 through to June 2007, ACLEI had not conducted any controlled operations and therefore an inspection was not necessary. However, this office has assisted ACLEI to prepare for the possibility of conducting controlled operations through discussions on the office's inspection activities and methodology, and through providing advice on compliance requirements.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The Act requires the Ombudsman's office to inspect the records of the AFP, the ACC and ACLEI at least once every 12 months. However, it is our policy to conduct two inspections of each agency's records per year if that agency has undertaken controlled operations. Essentially, our task is to ascertain whether

the agencies have complied with the requirements specified in Part 1AB of the Act relating to the authorisation, conduct and reporting of controlled operations.

As a matter of policy, Ombudsman staff generally refrain from inspecting records relating to controlled operation certificates that are current. Inspections are therefore limited to records associated with:

- (a) applications for controlled operation certificates made prior to or within the inspection period that are declined within the inspection period
- (b) controlled operation certificates issued within the inspection period where the controlled operation has ended in the inspection period
- (c) controlled operation certificates issued prior to the inspection period where the controlled operation has ended within the inspection period.

These records are referred to as 'eligible records'.

During 2006–07, the first inspection of each agency covered eligible records for the period 1 February 2006 to 31 July 2006. The second inspection covered eligible records for the period 1 August 2006 to 31 January 2007.

Inspections of the AFP's records were conducted from 21 to 23 August 2006 and from 27 February to 1 March 2007. Inspections of the ACC's records were conducted from 11 to 12 September 2006 and 14 to 16 March 2007.

There was a total of 27 eligible records and all of these were inspected: 18 for the AFP, and nine for the ACC.

Table 1: Number of records inspected

| AGENCY | FIRST INSPECTION PERIOD | SECOND INSPECTION PERIOD |
|---|--------------------------------|---------------------------------|
| Australian Crime Commission | 5 | 4 |
| Australian Federal Police | 9 | 9 |
| Australian Commission for Law Enforcement Integrity | N/A | 0 |

Inspection methodology

The inspection considers two elements of controlled operations:

- (a) the agencies' compliance with Part 1AB of the Act
- (b) the comprehensiveness and adequacy of reports to the Minister and Parliament.

Consideration is also given to whether the agencies are implementing administrative best practice. Inspection results which point to minor administrative errors or issues that may, if not addressed, lead to non-compliance at a later date or impact upon the ability of inspection staff to adequately assess agency compliance are raised as best practice issues.

Compliance with Part 1AB of the Act

The inspection involves checking that:

- the application for a controlled operation certificate was made by an ALEO to an authorising officer (s 15J)
- the form and content of the application for a certificate met the requirements of s 15K
- any urgent applications were made in appropriate circumstances, accompanied by sufficient information to enable an AFP authorising officer to make a decision, and met the requirements of s 15L
- certificates were issued on appropriate grounds (s 15M)
- the form and content of the certificates met the requirements of s 15N
- any applications to vary certificates were made by an ALEO to an authorising officer, the variation was appropriate and the documentation met the requirements of s 15NA
- the surrender of any certificate met the requirements of s 15O
- the termination of any certificate was carried out where appropriate and notice was given as required by s 15OA
- a certificate did not extend beyond three months from the date of issue unless a nominated member of the Administrative Appeals Tribunal (AAT) had reviewed the certificate and decided that it should be in force for six months, and accurate and comprehensive information had been provided to the AAT member (s 15OB)
- a certificate did not remain in force beyond the period prescribed by s 15P
- the Chief Executive Officer (CEO) of the Australian Customs Service (ACS) was notified as appropriate, and the notification met the requirements of s 15Q.

Comprehensiveness and adequacy of reports

The inspection of the comprehensiveness and adequacy of the *quarterly reports* is conducted by:

- (a) checking that quarterly reports are submitted within the time frame specified in s 15R
- (b) checking that quarterly reports contain the information required by ss 15R and 15S
- (c) comparing the information contained in agency files (particularly the report on the conduct of a controlled operation) against the information contained in the quarterly report to ensure that the information is accurate and comprehensive.

The standard quarterly reporting periods are:

- 1 August to 31 October
- 1 November to 31 January
- 1 February to 30 April
- 1 May to 31 July.

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

- (a) checking that the annual report was submitted to Parliament within the time frame prescribed by s 15T
- (b) checking that the annual report includes the information required by s 15T(2) and excludes information as required by s 15T(3) and (4)
- (c) comparing the information contained in agency files and quarterly reports against the information contained in the agency's annual report.

INSPECTION RESULTS

There was a high degree of compliance with the Act by both the AFP and the ACC. No recommendations were made to the AFP. Four recommendations were made to the ACC.

The combined annual report for the AFP and ACC for 2005–06 was inspected in this reporting period and feedback provided to each agency on their contribution. An assessment of the comprehensiveness and adequacy of the 2006–07 annual report, which was signed by the Minister for Justice and Customs on 10 October 2007, will be included in the office's next annual report on controlled operations.

A number of administrative issues requiring improvement were identified in the inspection reports to both the AFP and ACC. These issues are not reported here, as they did not result in recommendations, and the focus of this report is on issues of compliance with the Act.

AUSTRALIAN FEDERAL POLICE

Based on the results of the August 2006 inspection, the AFP was assessed as:

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

Based on the results of the February to March 2007 inspection, the AFP was assessed as:

- (a) complying with the requirements of Part 1AB of the Act
- (b) providing comprehensive and adequate information in quarterly reports to the Minister
- (c) generally providing comprehensive and adequate information in the 2005–06 annual report.

AFP compliance issues

The AFP was assessed as complying with the Act. However, some issues were identified which could benefit from management attention. In general, the AFP should ensure that:

- applications for controlled operations certificates more fully address how the operation will not seriously endanger the health or safety of any person, and not result in loss of, or serious damage to property in relation to s 15M(f)
- notifications are sent to the CEO of ACS under s 15Q in all situations when the applicant for the controlled operations certificate believes that illicit goods involved in the conduct of the operation may be dealt with by the ACS, even if they are not certain that the ACS will deal with the illicit goods (several notifications have been sent, but not in all cases where it appeared to be a possibility that that ACS would be dealing with the illicit goods)
- certificates include the details (to the extent known and relevant) of the nature and quantity of any illicit goods to which the operation relates as required by s 15N(2)(c)(ii), and the foreign countries through which any such illicit goods have passed, or are likely to pass, in the course of the operation as required by s 15N(2)(c)(iii)
- in relation to the content of AFP annual reports on controlled operations as required by s 15T(2)(b), that reasons are provided for not disclosing the identity of a person, in particular a person whose conduct was covered by the certificate (s 15S(2)(b)), as required by s 15S(5)(d).

AFP improvements

Overall the records held by the AFP provided a detailed and comprehensive record of controlled operations conducted under Part 1AB of the Act, and were of a high standard. The AFP continually refines and adds to their quality assurance mechanisms, and there was a noticeable improvement in the quality of records over the year.

AFP recommendations

No recommendations were made to the AFP.

AUSTRALIAN CRIME COMMISSION

Based on the results of the September 2006 inspection, the ACC was assessed as:

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

Based on the results of the March 2007 inspection, the ACC was assessed as:

- (a) generally complying with the requirements of Part 1AB of the Act
- (b) generally providing comprehensive and adequate information in quarterly reports to the Minister
- (c) generally providing comprehensive and adequate information in the 2005–2006 annual report.

ACC compliance issues

While the ACC was assessed as generally complying with the requirements of the Act, some compliance issues were identified that would benefit from management attention. The ACC should ensure that:

- notifications are sent to the CEO of ACS under s 15Q in all situations when the applicant for the controlled operations certificate believes that illicit goods involved in the conduct of the operation may be dealt with by the ACS, even if they are not certain that the ACS will deal with the illicit goods (all but one notification had been sent, and in the one case it appeared to be a possibility that that ACS would be dealing with the illicit goods)
- applications more fully address the grounds on which an authorising officer may issue a certificate authorising a controlled operation in relation to s 15M

- the procedures for the making of urgent applications (permissible if the applicant has reason to believe that the delay caused by making an application under s 15K may affect the success of the operation) are improved to ensure compliance with s 15L (an issue with the one urgent application made)
- applicants have a good understanding of the meaning of 'serious Commonwealth offence' and 'serious State offence that has a federal aspect' as specified in s 15HB to aid preparation of applications for certificates to conduct controlled operations (there was only one application which confused this issue)
- the quarterly reports identify, to the extent known, any person (other than a law enforcement officer) who, in the course of the operation, had possession of the narcotic goods, as required by s 15S(2)(e)(ii)
- applications provide clear and precise information to assist the authorising officer to be reasonably satisfied that if a person who is not a law enforcement officer is to be involved in the operation then the role to be assigned to the person could not adequately be performed by a law enforcement officer, as required by s 15M(h)
- certificates consistently identify each person who is not a law enforcement officer, and is permitted to be involved in the operation, and for each person identified, state the nature of the activities covered by the certificate in relation to that person, as required by ss 15N(2)(cb) and (cc).

ACC improvements

The ACC has undertaken a comprehensive review of its policies and procedures and has incorporated many of the recommendations made by this office. The ACC's review has resulted in the introduction of new policy for controlled operations and separate Standard Operating Procedures (SOP) that deal with the practical aspects of applying for, conducting and reporting on a controlled operation in a manner that is compliant with the requirements of the Act. The ACC advised that they have also introduced a range of quality assurance mechanisms and conducted compliance training nationally in February and March 2007, with further compliance training scheduled for later in 2007.

ACC recommendations and agency responses

The following recommendations were made based on the results of the inspection of the ACC records from 11 to 12 September 2006.

First inspection

Recommendation 1

That the ACC clarify its guidelines for making an urgent application and ensure that any staff making an urgent application for a controlled operation have access to appropriate advice and support.

Recommendation 2

That the ACC ensure that applications and certificates acknowledge and detail the involvement of all persons who are not law enforcement officers in a controlled operation.

Recommendation 3

That the ACC review the training given to officers responsible for preparing controlled operation applications and provide supplementary training to those officers and regions which appear to have ongoing difficulties in understanding the requirements of the Act in reference to s 15HB and generally.

Second inspection

The following recommendations were made based on the results of the inspection of the ACC records from 14 to 16 March 2007:

Recommendation 1:

The ACC should ensure that its procedures make it clear that the reporting requirements about possession of illicit narcotic goods apply to suspects as well as civilians and informants.

ACC responses

The ACC generally agreed with these recommendations and proposed various means to improve compliance in future in relation to those recommendations.

In relation to Recommendation 2 from the first inspection, the ACC was of the opinion that covert human intelligence sources, otherwise known as informants, should not be included on certificates. The ACC's full response to this issue was reported in the previous annual report.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

As previously mentioned, ACLEI did not conduct any controlled operations during the year. However, ACLEI provided the relevant quarterly reports to the Minister as required under the Act, and was assessed during the course of the year as providing quarterly reports within the time frame specified in s 15R that contained the information required by sections 15R and 15S.

REGIONAL INSPECTIONS

The purpose of a regional inspection is to focus attention on how the regional office is performing in relation to the relevant parts of the Act and to educate officers within the regional office about the role of the Ombudsman in monitoring compliance with the Act. In the period covered by this report Ombudsman staff conducted one regional inspection.

AFP—Perth

In November 2006, a regional inspection of the records held by the AFP's office in Perth was conducted. This inspection included the records relating to controlled operation certificates applied for by AFP officers based in Western Australia for the period August 2005 to November 2006.

The inspection found that the AFP in Perth maintained adequate records for controlled operations and that applications for controlled operations were of a high standard.

In addition to the inspection, a seminar was conducted aimed at informing investigators and other relevant members and employees of the AFP of the requirements of Part IAB of the *Crimes Act 1914*.

Prof. John McMillan
Commonwealth Ombudsman