



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

Australian Commission for Law Enforcement Integrity

Australian Crime Commission

Australian Federal Police

1 July 2014 to 30 June 2015

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

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CONTENTS

INTRODUCTION 1
OVERVIEW OF INSPECTION FINDINGS..... 3
AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY 8
AUSTRALIAN CRIME COMMISSION..... 10
AUSTRALIAN FEDERAL POLICE..... 15

INTRODUCTION

Part IAB of the *Crimes Act 1914* (the Act) provides for certain law enforcement agencies to conduct controlled operations. Controlled operations can be broadly described as covert operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence.

Where a controlled operation is authorised under the Act, participants are exempt from any criminal liability and indemnified from civil liability arising from their acts or omissions during the course of the operation, providing that certain conditions under the Act are met.

To ensure an appropriate level of transparency, the Act also imposes a number of reporting obligations on agencies.

What we do

The Commonwealth Ombudsman performs the monitoring mechanism under the Act and must, at least once every 12 months, inspect agencies' records to determine the extent to which the agency and its officers have complied with Part IAB of the Act. The Ombudsman must report to the Minister for Justice as soon as practicable after 30 June each year on inspections conducted during the preceding 12 months. This report sets out the results of the Ombudsman's inspections conducted between 1 July 2014 and 30 June 2015.

In this report, the Ombudsman must also include comments on the comprehensiveness and adequacy of the reports provided by agencies to the Minister and Ombudsman under ss 15HM and 15HN of the Act.

Who we oversee

The Ombudsman is required to oversee the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). The Ombudsman must also inspect the ACC's records to determine the extent of its compliance with corresponding state controlled operations legislation, if the ACC has used them.

Why we oversee agencies

Part IAB of the Act grants law enforcement agencies with extraordinary powers. It is part of the Ombudsman's role to provide assurance that agencies are approving and conducting controlled operations as Parliament intended, and if not, hold the agencies accountable to the Minister and the public.

How we oversee agencies

We have developed a set of inspection methodologies that we apply consistently across all agencies. These methodologies are based on legislative requirements and best-practice standards in auditing, and ensure the integrity of each inspection. We focus our inspections on areas of high risk and take into consideration the impact of non-compliance.

We form our assessments based on the records made available at the inspection, discussions with relevant teams, processes we observe and information staff provide in response to any identified issues. To ensure that agencies are aware of what we will be assessing, we provide them with a broad outline of our criteria prior to each inspection. This assists agencies in identifying sources of information to demonstrate compliance. If necessary, the Ombudsman can rely on coercive powers to obtain any information relevant to an inspection and is to be given information despite any other laws.

We encourage agencies to be upfront and self-disclose any instances of non-compliance to our office and inform us of any remedial action the agency has taken. At the end of each inspection we provide our preliminary findings to the agency to enable the agency to take any immediate remedial action.

We may also assist agencies in ensuring compliance through assessing agencies' policies and procedures, communicating 'best-practices' in compliance, and engaging with agencies outside of the inspection process.

Our criteria

The objective of our inspections is to determine the extent of compliance with the Act by the agency and its law enforcement officers. We use the following criteria and consider the following questions to assess compliance:

1. Were applications for authorities properly made and authorities properly granted?
2. Were applications for variations to authorities properly made to and decided by appropriate authorising officers?
3. Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members?
4. Were the reported activities covered by the authorities?
5. Were authorities properly cancelled?
6. Were reports properly made and the required records kept by the agency?

How we report

After an inspection, agencies are provided with detailed inspection reports. To ensure procedural fairness we provide a draft report on our findings to the agency for comment before it is finalised. The finalised reports are desensitised and form the basis of our reports to the Minister. Inspection results are considered finalised once the Ombudsman's internal report to the agency is completed, so typically there will be some delay between the date of inspection and the report to the Minister.

Included in this report is an overview of our compliance assessment of each agency, a discussion of each agency's progress in addressing any significant findings from previous inspections, details of any significant issues resulting from these inspections, and a comment on the adequacy of reports provided by agencies.

We may also discuss issues other than instances of non-compliance, such as the adequacies of an agency's policies and procedures to ensure compliance with the Act. Examples of what we may not include in this report are administrative issues or instances of non-compliance where the consequences are negligible.

This report covers our inspections of all authorities that expired or were cancelled during the period 1 January to 31 December 2014. For security reasons, we usually do not inspect records relating to authorities which are still in force.

OVERVIEW OF INSPECTION FINDINGS

This report presents the performance of each agency against our inspection criteria and discusses some exceptions to compliance (including where we were unable to determine compliance) for each agency. The following tables provide an overview of our inspection findings at each agency for each six-month inspection period.

Authorities ceasing between 1 January and 30 June 2014

Agency	Australian Commission for Law Enforcement Integrity	Australian Crime Commission	Australian Federal Police
Number of authorities inspected	2 out of 2	11 out of 11	81 out of 81
Criteria	Inspection findings		
Were applications for authorities properly made and authorities properly granted?	Compliant.	Compliant.	Compliant except in four instances. Unable to determine compliance in two instances.
Were applications for variations to authorities properly made to and decided by appropriate authorising officers?	Unable to determine compliance in one instance.	Not compliant in three instances. Unable to determine compliance in three instances.	Compliant.
Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members?	Compliant.	Compliant.	Compliant.
Were the reported activities covered by the authorities?	Nothing to indicate otherwise.	Nothing to indicate otherwise with the exception of one instance.	Four instances where conduct was not covered by an authority. Unable to determine in 23 instances whether conduct was covered by an authority.

Were authorities properly cancelled?	Not assessed as no authorities were cancelled.	Compliant.	Compliant except in two instances.
Were reports properly made and the required records kept by the agency?	Compliant with one exception in relation to the general register.	Compliant with some minor reporting discrepancies noted in the general register.	Compliant with some minor reporting discrepancies noted in the general register.

Authorities ceasing between 1 July and 31 December 2014

Agency	Australian Commission for Law Enforcement Integrity	Australian Crime Commission	Australian Federal Police
Number of authorities inspected	0 <i>ACLEI advised that no authorities expired or were cancelled during the inspection period.</i>	2 out of 2	84 out of 84
Criteria	Inspection findings		
Were applications for authorities properly made and authorities properly granted?	N/a	Compliant except in one instance. Unable to determine compliance in two instances.	Compliant except in one instance. Unable to determine compliance in two instances.
Were applications for variations to authorities properly made to and decided by appropriate authorising officers?	N/a	Compliant.	Compliant except in one instance.
Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members?	N/a	Not assessed as no applications for variations were made to Administrative Appeals Tribunal members.	Compliant.
Were the reported activities covered by the authorities?	N/a	Not assessed as no activities were undertaken.	Not compliant in five instances. Unable to determine compliance in two instances.

Were authorities properly cancelled?	N/a	Compliant.	Compliant.
Were reports properly made and the required records kept by the agency?	N/a	Compliant.	Compliant with one exception in relation to the general register and six-monthly report.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

We conducted one inspection at ACLEI from 17 to 18 September 2014. Although no recommendations were made as a result of the inspection, we were unable to determine compliance in one instance, which is further discussed under *Findings from 2014-15*.

Issues from previous inspections

In our last report to the Minister we reported that ACLEI had not included all of the information it was required to submit in its six-monthly report under s 15HM regarding extensions and variations to authorities. This issue was not identified again at the September inspection.

Findings from 2014-15

Finding 1

What the Act requires

Section 15GQ of the Act sets the grounds upon which an appropriate authorising officer must be satisfied of in order to grant a variation to a controlled operations authority.

What we found

For one authority, there were no records presented at the inspection to indicate that the appropriate authorising officer had considered the grounds set out under ss 15GQ(2)(c)-(h). The authorising officer granted the authority, and although the authorising officer may have had access to relevant documentation, as there was no evidence to confirm this, we were unable to determine compliance with s 15GQ of the Act.

ACLEI's response and advised remedial action

ACLEI advised that it accepted our finding and has since amended its processes to ensure that a record is kept to indicate that the authorising officer, when granting a variation, considered ss 15GQ(2)(c)-(h).

ACLEI also advised that for assurance purposes, it reviewed the circumstances of the variation discussed above and is satisfied that the authorising officer was provided with the original application addressing the grounds required under s 15G(2), which are the same grounds under s 15GQ(2). ACLEI is therefore of the view that the process followed to grant the variation was compliant.

Comprehensiveness and adequacy of reports

Section 15HM requires each agency to report to the Ombudsman and the Minister as soon as practicable after 30 June and 31 December on the details of its controlled operations during the previous six months. This section also sets out the details which must be provided for each report. Under s 15HN, as soon as practicable after 30 June in each year, each agency is required to submit a report to the Minister setting out the details required under ss 15HM(2), (2A), (2B) and (2C) in relation to controlled operations it authorised during the previous 12 months.

ACLEI submitted its six-monthly report under s 15HM for the period 1 January to 30 June 2014 to our office in accordance with the Act, and similarly submitted its 2013-14 annual report in accordance with the Act. We were satisfied that the required information was included in both reports.

AUSTRALIAN CRIME COMMISSION

We conducted our first inspection at the ACC in Sydney on 20 and 21 October 2014 and our second inspection in Melbourne on 21 April 2015. No recommendations were made as a result of either of these inspections.

However, at the first inspection we were unable to determine compliance in three instances and the ACC was assessed as non-compliant in another three instances regarding internally granted variations to an authority. For the same authority we were also unable to determine whether activities engaged in during the controlled operations were in accordance with a condition of the authority. Further details are provided below under *Findings from 2014-15*.

At the second inspection we were unable to determine compliance in two instances and the ACC was assessed as non-compliant in one instance regarding an urgent application for an authority. Similar issues were reported in our previous report to the Minister and are discussed under *Issues from previous inspections*.

Issues from previous inspections

In our last report to the Minister we reported on the below issues, two of which were self-disclosed by the ACC to our office. The ACC's progress in addressing these issues is also discussed below.

Urgent application for an authority was not compliant with the Act

The ACC self-disclosed that a written record was not made of an urgent application for an authority, contrary to the requirements under s 15GH(6) of the Act.

At the April 2015 inspection, we identified a similar issue in relation to a written record of an urgent application for an authority, where the record did not address all of the requirements under s 15GH. For the same application we were also unable to determine compliance in two other instances with s 15GH. The ACC advised that, in this instance, its internal procedures to ensure compliance had not been followed, and the ACC would address this issue through its internal training program and resources.

Application for variation was not compliant with the Act

The ACC self-disclosed that a written record for an application for a variation of an authority was not made, contrary to the requirements under s 15GP(3)(a) of the Act. This issue was not noted again during our 2014-15 inspections.

Authority issued for a longer period than permitted

The ACC self-disclosed that an authority was granted for a period of three months and one day, contrary to s 15GK(1)(h) which provides that an authority must not specify a period of effect that exceeds three months. The ACC advised that it implemented a process to ensure compliance with these provisions and no further instances were noted during our 2014-15 inspections.

Unable to determine if activities were conducted in accordance with authorities

In three instances we were unable to determine whether conduct engaged in during a controlled operation was authorised by the authority.

In two of these instances, there were no records available to demonstrate that law enforcement officers had directed the civilian participants listed on the authority to engage in the activities that were reported on. Under s 15HA(2) of the Act, a civilian participant of a controlled operation is protected from criminal liability if certain conditions are met. These conditions include acting in accordance with instructions of a law enforcement officer. When agencies involve civilians in a controlled operation, we are of the view that it is important for that agency to keep records that demonstrate consideration has been given to the conditions under which the civilian participant would be protected if they were to engage in activities that would otherwise constitute an offence.

In the third instance, we noted records on file that indicated that a person who was not listed as a participant on the authority may have engaged in conduct.

To address these issues, we suggested that the ACC consider amending its reporting processes to be more explicit about what activities participants did and did not engage in. The ACC noted our suggestion and advised it would review what information needed to be collected for the purposes of demonstrating compliance. No similar issues were noted during our 2014-15 inspections.

Findings from 2014-15

Finding 1

What the Act requires

Section 15GR(2) of the Act requires that, when an authorising officer varies an authority on their own initiative, the authorising officer must make a written record (in accordance with s 15GS), and give this written record to the relevant principal law enforcement officer (PLEO), as soon as practicable after granting the variation. Section 15GS of the Act stipulates the information that an authorising officer must provide when varying an authorisation.

What we found

At the October 2014 inspection we identified three issues relating to variations made on the authorising officer's own initiative to the same authority, which are listed below. We note that this was the first time the ACC had applied these provisions in this manner.

- For one variation, there was no written record of the variation, as required under s 15GR(2). The lack of a written record also meant that we were unable to determine whether the authorising officer had been satisfied that the variation complied with s 15GO(5), or had considered the matters set out in s 15GQ(2).
- For an urgent variation, the written record of the variation did not identify the controlled authority being varied or state the name and rank of the authorising officer who granted the variation, as required under s 15GS(1)(a) and (b).
- For another urgent variation, additional participants were authorised, however, the written record did not identify the activities that the additional participants were authorised to engage in, as required under ss 15GS(1)(e) and 15GO(2)(b).

The ACC's advised remedial action

The ACC accepted these findings and was proactive in addressing them, advising that it would:

- create new templates;
- re-write its policy, standard operating procedure and guidelines to include own-initiated variations by an authorising officer; and

- amend its general introductory training sessions to include material on these procedures.

Additionally, the ACC advised that compliance specialists would meet with the responsible authorising officer and relevant legal officers to consider the procedures associated with variations made on the authorising officer's own initiative.

We commended the ACC for its responsiveness, and we will test the effectiveness of these measures at future inspections.

Finding 2

What the Act states

Under s 15GK(1) an appropriate authorising officer may, when granting an authority, specify any conditions to which the conduct of the controlled operation is subject.

Section 15GO provides for how an appropriate authorising officer may vary an authority. Namely, an authority may be varied to: extend the period of effect of the authority (for a period that does not exceed three months); authorise additional participants; remove existing participants; and alter authorised conduct. The provisions also state that an authority must not be varied unless the authorising officer is satisfied on reasonable grounds that the variation will not authorise a significant alteration of the nature of the controlled operation concerned.

Section 15HA of the Act provides for the circumstances in which a person is protected from criminal responsibility when engaging in a controlled operation. These circumstances include the person engaging in conduct in accordance with an authority.

What we found

At the October 2014 inspection we noted that one authority was subject to a condition that placed certain restrictions around authorised conduct (activities). We note that this authority was varied to authorise additional conduct that was contrary to the condition.

Available records indicated that activities engaged in fell outside the condition of the authority. However, as the authority restricted these activities (by way of a condition) and authorised them (by way of variation), we were unable to conclusively determine whether the activities engaged in were authorised.

What we suggested

We suggested that the ACC seek legal advice in relation to this issue, particularly whether s 15GO allows an authorising officer to vary a condition of an authority. We also suggested that the ACC consider whether it would be more appropriate to include restrictions of this kind in the description of conduct permitted by the authority, rather than an overarching condition of the authority.

The ACC's response

The ACC advised that its internal legal team considers that an appropriate authorising officer may vary, revoke or amend a condition of a controlled operation authority, provided such a variation is not a significant alteration of the nature of the controlled operation, as required under s 15GO(5) of the Act. However, the ACC advised that it is considering our suggestion to include this type of restriction in the description of authorised conduct, rather than a condition of the authority.

Comprehensiveness and adequacy of reports

The ACC submitted its six-monthly reports under s 15HM for the periods 1 January to 30 June 2014 and 1 July to 31 December 2014 to this office in accordance with the Act, and similarly submitted its 2013-14 annual report in accordance with the Act. We were satisfied that the required information was included in all reports.

AUSTRALIAN FEDERAL POLICE

We conducted our inspections at the AFP's Headquarters in Canberra, from 27 to 30 October 2014 and from 13 to 15 April 2015. No recommendations were made as a result of either of these inspections, however a number of issues were either identified or self-disclosed by the AFP, the most significant of which are discussed below under *Findings from 2014-15*.

Issues from previous inspections

In our last report to the Minister we reported on the below issues, most of which were self-disclosed by the AFP to our office. The AFP's progress in addressing the issues is discussed below.

Participants and activities not covered by an authority

The AFP self-disclosed that one authority and the associated application did not identify the persons authorised to engage in the controlled operation, nor the nature of the authorised activities, as required under ss 15GK(1)(e) and (f). Despite these omissions, law enforcement officers engaged in conduct. The AFP advised that its legal team determined the authority was defective, a position with which we agreed.

The AFP self-disclosed another instance where an application to extend an authority was made one day after the authority expired. The AFP was aware that conduct engaged in after the authority expired was not covered.

As a result, the AFP advised that it amended its internal review processes. The above issues were not noted at our 2014-15 inspections.

We also identified an instance where it appeared that the AFP directed a civilian participant to engage in activities one day prior to a relevant authority being granted which would authorise the civilian participant and the activities. In response to this finding the AFP agreed that the civilian participant should have been covered by an authority. Similar instances were again self-disclosed by the AFP and identified by our office during our 2014-15 inspections, as discussed under *Findings from 2014-15*.

Requirements regarding urgent authorities were not met

The AFP self-disclosed one instance where an urgent authority was granted for a period of eight days, one day longer than permitted under s15GK(2)(h).

The AFP also self-disclosed three instances where a written record of an urgent authority was not made within the seven-day period required under

s 15GL. The AFP advised that it would review its internal guidance material and address this issue through training to prevent reoccurrences. The AFP self-disclosed this issue again during our 2014-15 inspections, as discussed under *Findings from 2014-15*.

Not notifying Customs when required

We noted one instance where the AFP did not notify the Chief Executive Officer of the former Australian Customs and Border Protection Service in accordance with s 15J. The AFP accepted our finding and advised appropriate remedial action. No further instances were identified at our 2014-15 inspections.

Six-monthly and annual reports

Some minor administrative errors were noted with the AFP's six-monthly reports and we noted some inconsistencies between the information provided in the AFP's six-monthly report and its 2013-14 annual report. The AFP advised that these inconsistencies were due to administrative errors in its six-monthly reports and the information contained in its annual report was correct. We did not note similar issues during our 2014-15 inspection except in one instance, as discussed under *Comprehensiveness and adequacy of reports*.

Findings from 2014-15

Finding 1

What the Act states

Section 15HA of the Act provides for the circumstances in which a person is protected from criminal responsibility when engaging in a controlled operation. These circumstances include the person being an authorised participant and engaging in conduct in accordance with an authority.

What we found and the AFP self-disclosed

At the October 2014 inspection, the AFP self-disclosed four instances where activities were undertaken without being covered by a valid authority.

- In the first instance, a law enforcement officer engaged in conduct although they were not listed as a participant in the authority. We note there were thorough follow-up actions taken by the AFP once this was identified.

- In the second instance, a law enforcement participant engaged in conduct prior to the authority being granted. We note the responsiveness of the AFP in identifying this issue and ceasing the activities.
- In the third instance, a law enforcement participant engaged in activities that were not prescribed as conduct on the authority. We note that a variation to the authority was sought to include these activities one day later.
- In the fourth instance, a civilian participant engaged in activities that were not prescribed as conduct on the authority. Additionally, we were unable to determine from available records whether or not the civilian participant was directed by a law enforcement officer to engage in the activities.

At the April 2015 inspection the AFP self-disclosed three instances where conduct was undertaken without being covered by a valid authority, and we identified a further two instances.

Self-disclosed by the AFP

- In the first instance, a civilian participant under the direction of a law enforcement officer engaged in activities that were not prescribed as conduct by the urgent authority. The AFP noted that the activities engaged in should also have been included as controlled conduct in the *application* for the urgent authority.
- In the second instance, a law enforcement officer engaged in conduct without being listed as a participant in the relevant authority.
- In the third instance, a law enforcement officer directed a civilian, who was not authorised, to engage in the conduct after the authorised civilian participant was unable to do so.

Identified by our office

- In the first instance, the civilian participant engaged in activities prior to the relevant authority being granted. It appeared that in this instance, the civilian may have been under the assumption that they were acting on a law enforcement officer's orders.
- In the second instance, the civilian participant engaged in activities before a variation to the relevant authority was granted which authorised those activities.

The AFP's advised remedial action

In response to these issues, the AFP has advised that targeted training has been provided to regional offices and it has reinforced the importance of undertaking only authorised conduct. Furthermore, the AFP advised that an online training course on controlled operations has been launched and is mandatory for all sworn members.

Finding 2

What the Act provides

As previously noted on page 11, under s 15HA(2) of the Act, a civilian participant of a controlled operation is protected from criminal liability if certain conditions are met. These include acting in accordance with instructions of a law enforcement officer. When agencies involve civilians in a controlled operation, we reiterate the importance that they are able to demonstrate adherence to these conditions.

What we found

At our October 2014 inspection, for 21 authorities that involved civilian participants, we did not see evidence that a law enforcement officer had directed the civilian participants to undertake the conduct they engaged in. Two additional instances were noted at our April 2015 inspection.

The AFP's advised remedial action

In response to this issue, the AFP advised that it has enhanced reporting requirements to capture such information. We note the significant reduction in the number of instances identified at our April 2015 inspection compared to our October 2014 inspection.

Finding 3

What the Act requires

Section 15GH(3) of the Act requires 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. Under s 15GL of the Act, the authorising officer who grants an urgent authority must also issue a written record of the urgent authority within seven days to the PLEO.

What the AFP self-disclosed

At the October 2014 inspection, the AFP self-disclosed that for one controlled operation, two consecutive urgent applications were made.

The AFP also self-disclosed that for two urgent authorities, the authorising officer issued a written record eight days after the authority was granted, contrary to the Act's requirements. Another instance where this occurred was self-disclosed at our April 2015 inspection.

Comprehensiveness and adequacy of reports

The AFP submitted its six-monthly reports under s 15HM for the periods 1 January to 30 June 2014 and 1 July to 31 December 2014 to our office in accordance with the Act, and similarly submitted its 2013-14 annual report in accordance with the Act. We were satisfied that the required information was included in all reports, except in one instance where the details of a personal injury sustained during the course of a controlled operation was not reported in its six-monthly report for the period 1 July to 31 December 2014 in accordance with s 15HM(2)(s). The AFP advised that the omission of these details was an oversight and it would include these details in its 2014-15 annual report.

