

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

FOR THE PERIOD 1 JULY 2019 TO 30 JUNE 2020

Report by the Commonwealth Ombudsman  
Michael Manthorpe PSM  
under s 15HO of the *Crimes Act 1914*



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# EXECUTIVE SUMMARY

This report presents the results of the Office of the Commonwealth Ombudsman's (the Office) inspections of the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP) under Part IAB of the *Crimes Act 1914* (Part IAB), between 1 July 2019 and 30 June 2020.

Part IAB provides a framework for law enforcement agencies to conduct covert operations, known as controlled operations, for the purpose of investigating certain serious offences. As authorising agencies under Part IAB, the Australian Commission for Law Enforcement Integrity (ACLEI), the ACIC and the AFP may grant an authority to authorise a controlled operation. Participants who are involved in these operations are protected from criminal responsibility and indemnified against civil liabilities that may arise as a result of activities undertaken during the course of the operation, provided that certain conditions are met.

This Office provides independent oversight of agencies' use of these powers by conducting inspections and reporting its findings to the Minister for Home Affairs. At each inspection, we assess whether an agency's use of controlled operations during the relevant period was compliant with Part IAB and check that it has processes in place to support compliance. We consider an agency's transparency and accountability, and encourage them to disclose issues to our Office as they arise. Where we or an agency identify issues, we focus on the actions the agency has taken to address them. We also check the agency's progress in addressing issues identified at previous inspections.

In the first half of 2019–20 we inspected a sample of the authorities that the ACIC and the AFP advised us had expired or were cancelled between 1 January and 30 June 2019 (the records period). We did not conduct an inspection of ACLEI between 1 July 2019 and 31 December 2019 because it did not have any relevant authorities for the records period.

We had planned to conduct inspections of ACLEI, the ACIC and the AFP in May 2020 but were unable to do so due to the travel and social distancing limitations imposed by the COVID-19 pandemic. We will include a sample of the records we could not inspect during 2019–20 in our next inspections under Part IAB at each agency and incorporate the results in our next annual report.

Overall, we consider both the ACIC and the AFP are generally compliant with the requirements of Part IAB. The number of compliance findings in high-risk areas has decreased in comparison to 2018–19, particularly regarding unauthorised conduct and participants.

# Part 1: Introduction – Scope and Methodology of Inspections

## Introduction

1.1. Part IAB enables law enforcement agencies to conduct controlled operations. Controlled operations are covert operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence.

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

1.3. To ensure an appropriate level of transparency about how and when controlled operations are used, Part IAB imposes a number of reporting obligations on agencies.

### *What we do*

1.4. The Ombudsman performs the independent oversight mechanism provided under Part IAB. The Office must, at least once every 12 months, inspect authorising agencies' records to determine the extent to which the agency and its officers complied with Part IAB. The Ombudsman must report to the Minister for Home Affairs (the Minister) 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 inspections the Office conducted between 1 July 2019 and 30 June 2020.

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

### *Who we monitor*

1.6. The Ombudsman is required to monitor the activities of ACLEI, the ACIC and the AFP. The Ombudsman must also inspect the ACIC's records to determine the extent of its compliance with corresponding State and Territory controlled operations legislation, if the ACIC has exercised those powers during the relevant period.

### ***Why we oversee agencies***

1.7. Part IAB grants law enforcement agencies extraordinary powers. The Ombudsman's oversight role is important in ensuring that agencies approve and conduct controlled operations in accordance with Part IAB and are held to account for instances of non-compliance. The Ombudsman's reporting obligations under Part IAB provide transparency to the Minister and the public on the use of these covert powers.

### ***How we monitor agencies***

1.8. The Office has developed a set of inspection methodologies and criteria that we apply consistently across all agencies. These methodologies are based on legislative requirements and best practice standards.

1.9. We focus our inspections on areas of high risk, taking into consideration the impact of non-compliance and each agency's past compliance record.

1.10. We assess compliance based on the records agencies make available at the inspection, discussions with relevant agency staff, observations of agencies' processes and agencies' remedial action in response to any issues they or we identify.

1.11. 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 to identify and present the best sources of information to demonstrate compliance.

1.12. We encourage agencies to disclose any instances of non-compliance to our Office and inform us of any remedial action they have taken, both at and between inspections. At the end of each inspection we convene a meeting with agency staff to discuss our preliminary findings so remedial action may be commenced without waiting for our written report.

1.13. We also assist agencies to achieve compliance by providing feedback on new and existing policies and procedures, communicating 'best practice' approaches to compliance and otherwise engaging with agencies between inspections.

### ***Our criteria***

1.14. The objective of our inspections is to determine the extent of an agency's compliance with Part IAB. We use the following criteria and consider the following questions to assess compliance:

- Did the agency obtain the proper authority to conduct the controlled operation?
- Were activities relating to a controlled operation covered by an authority?
- Were all records kept in accordance with Part IAB?
- Were reports properly made?
- Was the agency cooperative and frank?

1.15. Further details of our inspection criteria are provided at **Appendix A**.

### ***How we report***

1.16. To ensure procedural fairness, we give agencies the opportunity to comment on our findings. The findings from our inspection reports and agencies' responses are desensitised and summarised to form the basis of the Ombudsman's annual report to the Minister.

1.17. This report:

- provides an overview of our compliance assessment of each agency for the reporting period
- discusses each agency's progress in addressing any significant findings from previous inspections
- details any significant issues resulting from these inspections, and
- includes comments on the adequacy of reports the agencies provided to the Ombudsman and the Minister.

1.18. We may also report on issues other than instances of non-compliance, such as the adequacy of an agency's policies and procedures to ensure compliance with Part IAB. We generally do not report on administrative issues or instances of non-compliance where the consequences are negligible.

## **Part 2: AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION**

2.1. During 2019–20 we conducted one inspection of the ACIC from 28 October to 1 November 2019.

2.2. We had planned to conduct a second inspection in May 2020, but were unable to do so due to the travel and social distancing limitations imposed by the COVID-19 pandemic. A sample of the records we were unable to inspect in May 2020 (records relating to authorities that expired or were cancelled between 1 July and 31 December 2019) will be included in our next inspection of the ACIC’s controlled operations records in 2020–21.

2.3. At our 2019–20 inspection we assessed 30 of the 61 controlled operations authorities that expired or were cancelled between 1 January and 30 June 2019. The ACIC advised us that it did not use any corresponding State and Territory controlled operations legislation during the relevant records period.

2.4. We assessed a sample of authorities that we considered to be representative of the ACIC’s controlled operations records. We assessed authorities that represented varying degrees of risk, to test a range of the ACIC’s controlled operations processes and procedures. In our experience higher risk authorities tend to be those that relate to complex and long-running controlled operations that are subject to multiple variations or extensions and/or involve a large number of participants.

### **Issues from previous inspections**

2.5. During 2018–19 we identified:

- Several instances where it was not clear whether activities that participants engaged in during a controlled operation were authorised. We identified similar issues at our 2019–20 inspection although there were fewer instances compared to 2018–19 and most were identified, and disclosed to us by the ACIC.
- Two instances where the ACIC granted new authorities rather than seeking an extension to an existing authority. While this issue did not appear in the ACIC’s records during 2019–20, it is

an area of focus during our inspections of controlled operations records.

- One written record which did not accurately reflect the approved conduct. Similar issues arose again during our 2019–20 inspection.
- Two issues relating to the general register and other record-keeping matters. While the ACIC took appropriate remedial action in response to those particular matters, we observed an overall increase in instances of inconsistent record-keeping during 2019–20.

## **Findings from 2019–20**

### ***Finding 1—Unauthorised participants and activities***

#### **What Part IAB provides**

2.6. Sections 15HA and 15HB of Part IAB provide protection from criminal and civil liability for participants who engage in criminal conduct during the course of a controlled operation. However, if a participant’s conduct is not authorised, this protection may not apply and the participant may be vulnerable to criminal and/or civil liability for their actions.

2.7. Under ss 15HA(2)(e) and 15HB(e) of Part IAB, a civilian participant is not criminally responsible for an offence, and must be indemnified against any civil liability, if the participant acts in accordance with the instructions of a law enforcement officer.

2.8. Under s 15GK(1)(f)(ii) of Part IAB, a formal controlled operation authority must also specify, with respect to civilian participants, the particular controlled conduct that each person may engage in.

2.9. Section 15HE of Part IAB states a person who engaged in ancillary conduct is not criminally responsible for the ancillary offence if the person believed related controlled conduct was being engaged in, or would be engaged in, by a participant in a controlled operation. Section 15HE(3) of Part IAB sets out what constitutes an ancillary offence.

## **What we found**

2.10. We identified one instance, and the ACIC disclosed a further two instances, where it was unclear whether participants and conduct were authorised under a controlled operation authority.

### ***Unauthorised conduct***

2.11. We identified one controlled operation authority which did not detail the specifics of controlled conduct that civilian participants could engage in as required by s 15GK(1)(f)(ii) of Part IAB. The authority was subsequently varied to include specific controlled conduct, but the ACIC's records reflected that this occurred after that specific conduct (discussions about criminal conduct) had been undertaken.

2.12. The ACIC's position was that these discussions were connected to the conduct that was originally authorised and the variation was sought to enable conduct that would constitute separate offending. However, noting the requirement under s 15GK(1)(f)(ii) of Part IAB to specify the particular controlled conduct that civilian participants may engage in, and given the specificity of the varied conduct and the similarity to the conduct that occurred prior to the variation, we concluded there was ambiguity about whether the original (more general) authorised conduct encompassed the activities the participants undertook prior to the variation being made.

### ***Lawful instruction of civilian participants***

2.13. The ACIC disclosed one instance where the principal law enforcement officer was not listed as a law enforcement participant on the controlled operation authority.

2.14. The ACIC acknowledged that, although they were identified in the controlled operation authority and engaged in controlled conduct by instructing a civilian participant, the principal law enforcement officer was not also listed in the authority as a 'law enforcement participant'.

2.15. The ACIC's position was that the conduct of the principal law enforcement officer fell within the provisions of ancillary conduct under s 15HE of Part IAB and the principal law enforcement officer was therefore not criminally responsible for the ancillary offence. In our view this position creates ambiguity about the conduct that was intended to be authorised in the controlled operation authority.

2.16. The ACIC did not appear to have considered whether the civilian participant was covered under ss 15HA or 15HB of Part IAB, given that they had acted on instruction from the principal law enforcement officer who was not explicitly authorised to provide instruction. We consider that not explicitly authorising a principal law enforcement officer to give instruction under an authority creates ambiguity about whether the civilian participant's unlawful conduct (at the principal law enforcement officer's direction) is indemnified from criminal or civil liability under ss 15HA or 15HB of Part IAB.

2.17. We consider that the ACIC's typical practice of listing principal law enforcement officers as law enforcement participants in operations better manages the risk of the principal law enforcement officer's conduct not being indemnified.

### ***Unauthorised participant***

2.18. The ACIC disclosed one instance where a law enforcement participant named on the conduct log was not listed as a participant in the authority for the controlled operation. While we were satisfied, based on the ACIC's records, that the law enforcement officer's involvement did not amount to controlled conduct, we were concerned that such close involvement in activities that may amount to controlled conduct could pose a risk to compliance with s 15HA(2)(b) of Part IAB. Specifically, we consider there is a risk that, if direction or instruction is provided by a law enforcement officer not included in the controlled operation authority to a civilian participant, both the law enforcement officer's actions, and those of the civilian participant, may not be covered by the authority.

### **The ACIC's response**

2.19. The ACIC advised it is seeking advice about the potential unauthorised conduct discussed at paragraphs 2.11 and 2.12. We will follow up this issue at our next inspection.

2.20. The ACIC acknowledged the findings regarding lawfully instructing participants and the unauthorised participant without further comment.

## ***Finding 2—Subsequent urgent controlled operation authority granted***

### **What Part IAB provides**

2.21. Section 15GJ(2) of Part IAB states that, while nothing in Part IAB prevents an authority being granted in respect of a controlled operation that has been the subject of a previous authority, the subsequent authority must be a formal authority.

### **What we found**

2.22. We identified two instances where the ACIC granted urgent verbal controlled operations authorities subsequent to other related controlled operations authorities, contrary to the limitation provided by s 15GJ(2) of Part IAB.

2.23. In the first instance, the ACIC granted an urgent authority subsequent to three formal authorities for the same controlled operation. Although the ACIC followed its internal policy by seeking advice prior to applying for the urgent authority, the advice focussed on whether a separate authority (rather than a variation) was justified, and did not appear to consider whether the urgent authority was prevented by s 15GJ(2) of Part IAB.

2.24. We noted the availability of internal guidance to staff that an urgent authority could not be granted where there had been a previous urgent authority, but this guidance did not address limitations in granting an urgent authority following a relevant formal authority.

2.25. In the second instance, the ACIC granted an urgent controlled operation authority regarding a criminal group where there had previously been a formal authority. Internal advice again addressed whether a separate authority, as opposed to a variation, was justified without appearing to consider s 15GJ(2) of Part IAB. Subsequent advice, which considered whether an urgent authority could be granted given there was a previous authority relating to the same criminal group, was dated after the urgent authority had already been granted.

2.26. Seeking advice after having already applied for, and been granted, a controlled operation exposes participants to risks of civil or criminal liability if the authority is subsequently determined to be invalid.

## **The ACIC's response**

2.27. In response to our finding about the urgent controlled operation authority discussed in paragraph 2.23, the ACIC advised it does not consider the authority was prevented by s 15GJ(2), as the applicant was satisfied the controlled operation was not the subject of a previous authority.

2.28. The ACIC acknowledged the second instance described above without further comment.

### ***Finding 3—Approved conduct not reflected in written record***

#### **What Part IAB provides**

2.29. Section 15GK(1) of Part IAB sets out the information that must be included in a formal authority. Section 15GK(1)(e) of Part IAB requires that a formal authority state the identity of persons authorised to engage in controlled conduct for the purposes of the controlled operation. Under s 15GK(1)(f)(i) of Part IAB, a formal authority must also specify the nature of the controlled conduct that law enforcement participants may engage in.

2.30. Section 15GK(2) of Part IAB sets out the information that must be included in an urgent authority. This includes specifying the nature of the conduct that law enforcement officers may engage in and the particular controlled conduct that any civilian participant may engage in.

#### **What we found**

2.31. Our inspection identified several controlled operation authorities that did not specify that law enforcement officers could direct civilian participants to undertake controlled conduct. We note that it is the ACIC's usual practice to include controlled conduct for law enforcement participants instructing a civilian participant on a controlled operation authority.

2.32. In one instance, the authority did not include particular conduct authorising the law enforcement participants to instruct the civilian participant to engage in the controlled conduct. However, the authority did state the civilian participant could engage in the controlled conduct at the direction of a law enforcement participant. This gap was rectified by a subsequent internal variation, which specifically authorised certain law

enforcement participants to instruct the civilian participant to engage in that conduct.

2.33. In the second instance, the wording of the authority did not specifically authorise the law enforcement participant to provide instruction to the civilian participant, just to 'work with' and 'assist' them.

2.34. We identified two further instances where the controlled operations authorities did not state that the civilian participants' conduct was to be at the direction of law enforcement participants.

2.35. Where an authority does not specify conduct, this can create ambiguity about what conduct is covered by an authority and, in turn, increase the risk of unauthorised conduct and exposure to civil and/or criminal liability.

### **The ACIC's response**

2.36. The ACIC advised that it would review its internal guidance and procedural documents regarding how references to controlled conduct in authorities are drafted.

### ***Finding 4—General register and record-keeping matters***

#### **What Part IAB provides**

2.37. Section 15HQ(1) of Part IAB states that the chief officer of an authorising agency must cause a general register to be kept.

2.38. Section 15HQ(2) of Part IAB sets out what must be recorded in the register including:

- the details of the relevant offences in respect of which controlled conduct under the authority was to be engaged in
- the period of effect of the authority
- any relevant date and time of cancellation
- the date and time the controlled operation commenced and ceased, and
- the operation's outcome.

## **What we found**

2.39. We identified that the ACIC's general register did not include details of the relevant offences as required by s 15HQ(2)(b)(iv) of Part IAB. The ACIC advised that, although this information had previously been recorded, when it adapted the register to improve its compliance with other record-keeping obligations, it inadvertently removed the section of the register that captured information required by s 15HQ(2)(b)(iv) of Part IAB.

2.40. When reviewing the register, we identified many instances where the template guidance and yellow highlighting from working copies remained. The inclusion of guidance/template content not applicable to the relevant authority caused affected documents to appear incomplete. In other instances, additions to the general register had not been completed and information was missing.

2.41. We also identified several instances where the information recorded was incorrect, or where required information was not included in the general register. For example, we identified an incorrect date for the cessation of a controlled operation, an incorrect commencement date for controlled conduct, the absence of an identified period of effect for an authority, and a statement that an authority had been cancelled when it had expired.

## **The ACIC's response**

2.42. The ACIC advised it had updated the general register to ensure offences are specified as required by s 15HQ(2)(b)(iv) of Part IAB.

2.43. The ACIC also advised it had corrected the relevant general register records where information was incorrect or incomplete.

## ***Comprehensiveness and adequacy of reports***

2.44. Section 15HM of Part IAB requires each agency to report to the Ombudsman and the Minister twice each year, as soon as practicable after 30 June and 31 December, on the details of its controlled operations during the preceding six months. This section also sets out the details that must be included in the report.

2.45. Under s 15HN of Part IAB, 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.

2.46. The ACIC submitted its six monthly reports under s 15HM of Part IAB for the periods 1 January to 30 June 2019, 1 July to 31 December 2019 and 1 January to 30 June 2020 to our Office, as well as its 2018–19 and 2019–20 annual reports in accordance with Part IAB. During 2019–20 we inspected the six monthly report for the period from 1 January to 30 June 2019 as well as the 2018–19 annual report, and identified a number of errors.

2.47. In three instances, information was incorrectly reported in the annual and six monthly reports.

2.48. We also identified that, across the ACIC's files, not all targets listed in the application and authority for the controlled operation were reflected in the six monthly reports. This was because ACIC staff had adopted a practice of only including persons in a six monthly report if they were actively targeted. We note this is contrary to the ACIC's procedures.

2.49. The ACIC has since advised it will include an addendum in the six monthly report for the period 1 July to 31 December 2020 to include and correct the relevant information.

2.50. Despite the instances above, we consider the ACIC has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

## **Part 3: AUSTRALIAN FEDERAL POLICE**

3.1. During 2019–20 we conducted one inspection at the AFP. We had intended to conduct a second inspection in May 2020, but were unable to do so due to travel and social distancing limitations imposed by the COVID-19 pandemic.

3.2. At our inspection from 11 to 15 November 2019 we assessed 27 of the 48 controlled operations authorities that expired or were cancelled between 1 January and 30 June 2019.

3.3. We selected a sample of authorities that we considered to be representative of the AFP’s controlled operations records. These authorities represented varying degrees of risk, and enabled us to test a range of the AFP’s controlled operations processes and procedures. We consider higher risk authorities are those that relate to complex and long-running controlled operations, such as those varied or extended multiple times or involving a large number of participants.

3.4. A sample of the records we were unable to inspect in May 2020 (records relating to authorities that expired or were cancelled between 1 July and 31 December 2019) will be included in our next inspection of the AFP’s controlled operations records in 2020–21.

### **Issues from previous inspections**

3.5. During 2018–19 we identified:

- Three instances where participants and/or activities of controlled operations were not authorised under a relevant controlled operation authority. Similarly, in 2019–20 in four instances we were unable to determine from the AFP’s records whether the conduct of civilian participants as part of controlled operations was appropriately authorised and indemnified. We do not consider these instances are representative of a systemic problem, but we continue to focus on issues of unauthorised conduct and/or activities as an area of high risk and encourage the AFP to maintain a continued focus on improvement in this area.
- Three instances where the AFP granted new authorities rather than seeking an extension to an existing authority. While this issue did not appear in the AFP’s records during 2019–20, it

continues to be an area of focus during our inspections of agencies' controlled operations records.

- Two instances where controlled operations were not authorised by the Commissioner or Deputy Commissioner when they appeared to meet the definition of a 'major controlled operation'. This issue did not appear in the AFP's records during 2019–20.
- An instance, disclosed by the AFP, where the formal record of an urgent (verbal) variation of authority was not provided 'as soon as practicable' and, instead, was provided approximately one month after it was authorised. While this issue did not occur again in 2019–20 we identified a related issue with the content of a written record of an urgent application (discussed below).
- Three issues relating to the adequacy and comprehensiveness of reports, particularly consistency with other record-keeping. Although the AFP took appropriate remedial action on those matters, at our 2019–20 inspection we observed an overall increase in issues regarding inconsistent record-keeping.

## **Findings from 2019–20**

### ***Finding 1—Unable to determine that civilian participant conduct was under law enforcement officer direction***

#### **What Part IAB provides**

3.6. Under ss 15HA(2)(e) and 15HB(e) of Part IAB, a civilian participant in a controlled operation is protected from criminal responsibility and indemnified from civil liability if he or she acts in accordance with the instructions of a law enforcement officer.

#### **What we found**

3.7. We identified four instances where we were unable to determine from the records available that activities undertaken by civilian participants were directed by a law enforcement officer.

3.8. In these circumstances, the Final Effectiveness Reports, conduct logs, and controlled operation authorities did not provide consistent confirmation that conduct undertaken by civilian participants was done so under the direction of a law enforcement officer.

3.9. As a result, we were unable to determine if the civilian participant conduct was appropriately authorised and indemnified under ss 15HA(2)(e) and 15HB(e) of Part IAB.

### **The AFP's response**

3.10. The AFP acknowledged the importance of including explicit details within Final Effectiveness Reports and advised it would continue to quality check all Final Effectiveness Reports with a focus on ensuring participant conduct is reported appropriately.

### ***Finding 2—Required considerations missing from applications for authorities and variations of authorities***

#### **What Part IAB provides**

3.11. Section 15GH(4)(a) of Part IAB provides that an application for a controlled operation authority must provide sufficient information to enable the authorising officer to decide whether or not to grant the application.

3.12. Under ss 15GI(2)(b) and (c) of Part IAB, an authorising officer must not grant an authority to conduct a controlled operation unless satisfied on reasonable grounds that:

- the nature and extent of the suspected criminal activity justify the conduct of a controlled operation; and
- any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation.

3.13. Under ss 15GQ(2) and 15GV(2) of Part IAB, an authorising officer or nominated Tribunal member must not vary an authority unless satisfied on reasonable grounds of a number of matters including that:

- the nature and extent of the suspected criminal activity justify the variation (ss 15GQ(2)(b) and 15GV(2)(b)); and
- any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation (ss 15GQ(2)(c) and 15GV(2)(c)); and
- the proposed controlled conduct will be capable of being accounted for in a way that will enable the reporting

requirements of Division 4 to be complied with (ss 15GQ(2)(e) and 15GV(2)(e)); and

- any conduct involved in conducting the controlled operation will not:
  - seriously endanger the health or safety of any person (ss 15GQ(2)(g)(i) and 15GV(2)(g)(i)); or
  - cause the death of, or serious injury to, any person (ss 15GQ(2)(g)(ii) and 15GV(2)(g)(ii)); or
  - involve the commission of a sexual offence against any person (ss 15GQ(2)(g)(iii) and 15GV(2)(g)(iii)); or
  - result in significant loss of, or serious damage to, property other than illicit goods (ss 15GQ(2)(g)(iv) and 15GV(2)(g)(iv)).

### **What we found**

3.14. In a number of the records we inspected, we identified that applications for controlled operations authorities did not include an explicit statement that the nature and extent of the criminal activity justified the use of a controlled operation (s 15GI(2)(b)), or that any controlled conduct would be limited to the maximum extent possible (s 15GI(2)(c)).

3.15. Similarly, we identified several instances where applications to vary controlled operations (both those made to an AFP authorising officer and to a nominated Tribunal member) did not address ss 15GQ(2)/15GV(2)(b), (c), (e), or (g) of Part IAB.

3.16. While not addressed in the respective applications, each of these elements was addressed in the corresponding authorities by way of template wording.

### **The AFP's response**

3.17. The AFP advised that, based on consultations internally and with our Office, it amended its controlled operations application template to ensure compliance with ss 15GI(2)(b) and (c) of Part IAB.

### ***Finding 3—Written record of urgent application did not contain required information***

#### **What Part IAB provides**

3.18. Under s 15GP(3)(b) of Part IAB, an urgent variation application may be made orally in person, by telephone or by other forms of communication if the applicant believes that the delay caused by making a written (formal) application under s 15GP(3)(a) of Part IAB may affect the success of the controlled operation to which the authority relates.

3.19. Under s 15GP(8) of Part IAB, as soon as practicable after making an urgent oral variation application, the applicant must make a written record of the application and give a copy of it to the authorising officer to whom the application was made.

#### **What we found**

3.20. In one instance we identified that a written record of an urgent variation application did not explicitly identify why the delay anticipated in making a formal variation application may affect the success of the controlled operation. This was also not directly addressed in the requesting officer's contemporaneous notes relating to the urgent variation.

3.21. While Part IAB does not explicitly require this element to be addressed in the application, given the applicant for an urgent variation must have reason to believe an urgent variation is required, we consider it better practice to demonstrate these reasons in contemporaneous records.

#### **The AFP's response**

3.22. The AFP acknowledged this finding and advised its better practice guides and urgent applications checklist now include the requirement to keep contemporaneous notes of the briefing information to the authorising officer, including the reason for seeking the urgent application.

3.23. The AFP advised it has reiterated this requirement to all investigative teams.

## ***Finding 4— General register and record-keeping matters***

### **What Part IAB provides**

3.24. Under s 15HQ of Part IAB, the chief officer of an authorising agency must cause a general register to be kept, specifying details of applications made to, and authorities granted by, authorising officers of an agency. For authorities granted under Part IAB, certain details must be specified in the register, including:

- the identity of each person authorised to engage in controlled conduct for the purposes of the controlled operation (s 15HQ(2)(b)(vi)); and
- the nature of the controlled conduct that law enforcement participants were authorised to engage in (s 15HQ(2)(b)(vii)); and
- the particular controlled conduct (if any) that each civilian participant was authorised to engage in (s 15HQ(2)(b)(viii)); and
- the date and time the controlled operation began, the date on which the operation ceased, and the outcomes of the operation (s 15HQ(2)(b)(x)).

### **What we found**

3.25. During our inspection, we identified that the AFP's general register did not include fields for all of the requirements under s 15HQ of Part IAB.

3.26. During the inspection the AFP advised our Office that it considers its register, when combined with individual Final Effectiveness Reports for each authority, meets the general register requirements of s 15HQ of Part IAB. However, during the inspection, we were unable to identify any policy or procedural documents that sufficiently articulated that the AFP's Final Effectiveness Reports are linked to its general register and serve the purpose of meeting the AFP's legislative obligations under s 15HQ of Part IAB. Additionally, the register is an electronic document and Final Effectiveness Reports are held separately as hard copy documents on individual controlled operations files.

3.27. In order to rely upon the combination of its register and individual Final Effectiveness Reports to meet its requirements under s 15HQ of Part IAB, the AFP needs to more comprehensively document this practice

and the Final Effectiveness Reports need to be clearly linked to the general register.

### **The AFP's response**

3.28. The AFP advised its better practice guide on completing a controlled operations Final Effectiveness Report provides advice that the Final Effectiveness Report forms part of the general register and is required to meet compliance requirements under s 15HQ of Part IAB.

3.29. The AFP also advised that it implemented a clear link between the relevant Final Effectiveness Report and the general register.

3.30. We will review the AFP's better practice guide and the links between the Final Effectiveness Reports and general register at our 2020–21 inspection.

### ***Comprehensiveness and adequacy of reports***

3.31. Section 15HM of Part IAB requires each agency to report to the Ombudsman and the Minister twice each year, as soon as practicable after 30 June and 31 December, on the details of its controlled operations during the preceding six months. This section also sets out the details that must be included in the report.

3.32. Under s 15HN of Part IAB, as soon as practicable after 30 June of 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) of Part IAB in relation to the controlled operations it authorised during the previous 12 months.

3.33. The AFP submitted its six monthly reports under s 15HM of Part IAB for the periods 1 January to 30 June 2019 and 1 July to 31 December 2019 to our Office, and its 2018–19 annual report in accordance with Part IAB. We will assess the AFP's 2019–20 annual report during the 2020–21 inspection cycle.

3.34. During 2019–20 we inspected the AFP's six monthly report for the period 1 January to 30 June 2019 as well as the 2018–19 annual report, and identified three errors within the six monthly report.

3.35. In two instances the report did not include the identity of all persons targeted, and in one instance the date of application for an urgent variation was not specified.

3.36. The AFP advised it would provide a revised schedule to the Minister and this Office in the next six monthly report submission to rectify the identified omissions.

3.37. Despite the instances detailed above, we consider the AFP has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

# APPENDIX A – INSPECTION CRITERIA AND METHODOLOGY

**Audit Objective:** To determine the extent of compliance with Part IAB of the *Crimes Act 1914* (Part IAB) by the agency and its law enforcement officers (s 15HS(1)).

## 1. Were controlled operations conducted in accordance with Part IAB of the Act?

### 1.1. Did the agency obtain the proper authority to conduct the controlled operation?

**1.1.1.** What are the agency's procedures to ensure that authorities, extensions and variations are properly applied for and granted, and are they sufficient?

**1.1.2.** What are the agency's procedures for seeking variations from a nominated Tribunal member and are they sufficient?

**1.1.3.** What are the agency's procedures to ensure that ongoing controlled operations are subject to a nominated Tribunal member's oversight and are they sufficient?

**1.1.4.** What are the agency's procedures for cancelling authorities and are they sufficient?

### 1.2. Were activities relating to a controlled operation covered by an authority?

**1.2.1.** What are the agency's procedures to ensure that activities engaged in during a controlled operation are covered by an authority and are they sufficient?

**1.2.2.** What are the agency's procedures to ensure the safety of participants of controlled operations?

**1.2.3.** What are the agency's procedures for ensuring that conditions of authorities are adhered to?

## 2. Was the agency transparent and were reports properly made?

### 2.1. Were all records kept in accordance with Part IAB?

**2.1.1.** What are the agency's record keeping procedures and are they sufficient?

**2.1.2.** Does the agency keep an accurate general register?

### 2.2. Were reports properly made?

**2.2.1.** What are the agency's procedures for ensuring that it accurately reports to the Minister and Commonwealth Ombudsman and are they sufficient?

**2.2.2.** What are the agency's procedures for meeting its notification requirements and are they sufficient?

### 2.3. Was the agency cooperative and frank?

**2.3.1.** Does the agency have a culture of compliance?  
 Was the agency proactive in identifying compliance issues?  
 Did the agency self-disclose issues?  
 Were issues identified at previous inspections addressed?  
 Has the agency engaged with the Commonwealth Ombudsman's office, as necessary?