

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

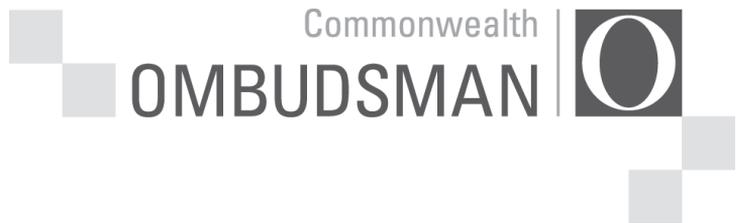
Australian Crime Commission

Australian Federal Police

2011–12

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

September 2012



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INTRODUCTION

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

Given the extraordinary powers Part IAB of the Act grants law enforcement agencies, under s 15HS of the Act, the 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 determine the extent of compliance with Part IAB of the Act. The Ombudsman must also inspect the records of the ACC to determine the extent of compliance with corresponding state controlled operations laws.

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

Content of this report

This report covers the Ombudsman's work and activities in monitoring controlled operations during the period 1 July 2011 to 30 June 2012 and includes:

- an overview of the methodology used to assess law enforcement agencies' compliance with Part IAB of the Act
- an assessment of the levels of compliance demonstrated by the AFP and the ACC with the requirements of Part IAB of the Act
- the recommendations made by the Ombudsman during 1 July 2011 to 30 June 2012.

No inspections were conducted of ACLEI during the period 1 July 2011 to 30 June 2012, as ACLEI advised that it did not undertake any controlled operations under the Act.

No inspections were conducted of the ACC's activities under corresponding state controlled operations laws during the period 1 July 2011 to 30 June 2012, as the ACC advised that it did not use corresponding state controlled operations laws.

Overview of agency compliance

The majority of controlled operations records held by the AFP and the ACC during 2011–12 demonstrated compliance with Part IAB of the Act. Both agencies made progress towards addressing our previous recommendations.

In particular, the AFP improved compliance by providing a consolidated general register and the ACC improved its processes to ensure that it seeks external review by the Administrative Appeals Tribunal (AAT) for controlled operations that extend beyond three months. However, we identified a number of areas where improvements may be made by both the AFP and the ACC. Further details are provided within the sections on each agency.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

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

Under the Act, we are required to conduct at least one annual inspection of each law enforcement agency. Due to the large number of controlled operations and their respective records, it is the practice of this office to conduct two inspections each financial year. This ensures that issues are quickly identified and addressed, particularly as agencies continue to increase their use of controlled operation provisions.

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

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

'Authorities' are internally issued to AFP and ACC investigators by the agencies' respective appropriate authorising officers.

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

Table 1: Dates and periods of inspections

AGENCY	FIRST INSPECTION PERIOD Records from 1 January to 30 June 2011	SECOND INSPECTION PERIOD Records from 1 July to 31 December 2011
ACC	19 to 20 October 2011	2 April 2012
AFP	7 to 11 November 2011	16 and 19 April 2012

Of the 157 available records for inspection at the AFP and the ACC, we inspected 79%, as represented in the table below.

Table 2: Number of authorities inspected

AGENCY	FIRST INSPECTION PERIOD Records from 1 January to 30 June 2011	SECOND INSPECTION PERIOD Records from 1 July to 31 December 2011
ACC	11 of 11 authorities were inspected	4 of 4 authorities were inspected
AFP	47 of 80 authorities were inspected	62 of 62 authorities were inspected

Inspection methodology

The inspections involved assessing that, for the AFP and ACC:

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

AUSTRALIAN FEDERAL POLICE

Overview

Based on the results of the inspection conducted from 7 to 11 November 2011 (the first inspection), the AFP was assessed as generally compliant with the requirements of Part IAB of the Act. Although no recommendations were made, a number of best-practice suggestions were made in relation to how the AFP may better comply with Part IAB of the Act.

The AFP generally agreed with these suggestions.

Based on the results of the inspection conducted from 16 to 19 April 2012 (the second inspection), the AFP was assessed as generally compliant with the requirements of Part IAB of the Act. However, one recommendation was made to the AFP as a result of the second inspection.

Recommendation: Period of validity of authorities

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

The AFP agreed to this recommendation and has advised that it is developing an electronic calculator which will automatically calculate expiry dates and assist investigators and authorising officers to eliminate errors.

During the 2011–12 inspections, it was evident that the AFP had taken measures to address previous recommendations and findings made by this office.

The AFP's progress in addressing previous recommendations

Two recommendations were made to the AFP as a result of our inspections during 2010–11.

Previous Recommendation: Civilian participants

The Australian Federal Police should ensure that an authority purporting to cover civilian participants comply with s 15GK(1)(e) and (f) of the Act by specifying the identity of each civilian participant and the conduct each civilian participant may engage in.

No issues were noted in our first inspection during 2011-12. However, the AFP self-disclosed one authority during the second inspection that did not comply with this requirement as it did not identify each civilian participant in the controlled operation.

The AFP should continue its efforts in ensuring that it meets the requirements of ss 15GK(1)(e) and (f) of the Act.

Previous Recommendation: General register

The Australian Federal Police should establish a consolidated general register and ensure that it meets all requirements under s 15HQ of the Act.

This recommendation was made as a result of the AFP's general register being a combination of existing records.

While the Act does not specify a format for the general register, it was our view that the AFP should maintain a separate, consolidated general register containing the information required under s 15HQ.

At both inspections, the AFP provided a general register in a consolidated format. Some minor administrative errors were noted at both inspections. However, the AFP has either self-disclosed or advised it has corrected the errors identified.

Discussion of issues identified in 2011-12

Period of validity of authorities (first and second inspections)

An authority to conduct a controlled operation comes into force, and the controlled operation is taken to commence, at the time the authority is granted (s 15GN(1)). For example, an authority issued at 2pm on 3 May 2012 for five days commences at that time and expires at 11:59pm on 7 May 2012.

During both inspections, we noted a total of six cases where the AFP incorrectly calculated the expiry dates of authorities. Five of these occurred on authorities issued by the AFP, including one urgent authority. The other related to the variation of an authority by application to the AAT.

For the five authorities issued by the AFP, it should be noted that the expiry dates stated on the authorities did not result in controlled conduct occurring without an authority. One authority was cancelled prior to its expiry; controlled conduct under another authority concluded before the authority expired; and three authorities were issued for less than the maximum permitted period of three months. The AFP advised that it was within the

powers of the authorising officer to issue these three authorities as they did not exceed the maximum period.

A similar issue regarding an incorrect expiry date was noted for a variation to an authority made by application by the AFP to the AAT. The AFP sought an extension of the authority for three months by applying to the AAT. The expiry date stated on the extension was three months and one day, rather than the maximum period of three months. The AFP advised the conduct concluded on the last day of the actual three month period.

In all of these cases, it appears that the relevant applicant or the appropriate authorising officer incorrectly calculated the expiry dates. As this issue was noted in both inspections, the following recommendation was made.

Recommendation

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

The AFP advised that, in response to this recommendation, it is developing an electronic calculator which will automatically calculate expiry dates and assist investigators and authorising officers to eliminate errors.

Major controlled operations and the requirement to extend an authority (first and second inspections)

Section 15GD(2)(b) of the Act defines a 'major controlled operation' as a controlled operation that is likely to continue for more than three months. Section s 15GF(1) specifies that only the AFP Commissioner or a Deputy Commissioner may authorise a major controlled operation. This requirement only applies to AFP controlled operations.

To continue a controlled operation beyond three months, s 15GU requires that the law enforcement agency seeks approval from a nominated member of the AAT. An approval by an AAT member extends the controlled operation by a maximum of three months at a time.

The AFP's internal policy required that, to apply to the AAT to extend any controlled operation beyond three months, the operation must be classified as a major controlled operation. This ensured that an appropriate level of scrutiny (by the Commissioner or a Deputy Commissioner) was applied to operations which continued beyond three months.

While this is a good internal control to ensure that a higher level of scrutiny is applied to long-running operations, we noted that an unintended consequence may arise when a controlled operation is not initially classified as a major controlled operation and needs to continue beyond three months. In such cases, the AFP's internal policy did not permit it to apply to the AAT for an extension, and instead, a new authority for a controlled operation was issued by the AFP.

At the first inspection, we noted three authorities where this occurred. The AFP did not initially apply for a major controlled operation because it was believed that the controlled operation would not continue beyond three months. The case involved two authorities in this inspection period (and one authority from the previous inspection period of 2009-10). All three subsequent authorities related to the same controlled operation and none were issued for a major controlled operation, as it was thought at the start of each of the three months periods, that the operation would not continue beyond three months.

A further two authorities, which were issued internally by the AFP to continue previous controlled operations, were noted at the second inspection.

In our view, regardless of whether or not an authority was initially issued for a major controlled operation, the AFP is required to apply to the AAT to extend the controlled operation beyond three months. However, we acknowledged there was some ambiguity around this in instances where the AFP did not initially issue an authority to conduct a major controlled operation, but the operation continued beyond three months. As such, we suggested that the AFP seek advice from the Attorney-General's Department (AGD) on this issue.

The AGD advised the AFP that it agreed with our assessment. The AGD also considered that applying to the AAT on every occasion when a variation to an authority would extend the duration of a controlled operation beyond three months is consistent with the intent of the legislation. Further, the AGD also agreed that the AFP's current practice, while achieving what the AFP considers as good internal scrutiny, can result in operations not being subject to external scrutiny by the AAT.

In July 2012, the AFP advised that it has implemented the practice of applying to a nominated AAT member for all controlled operations that need to continue for longer than three months. We will assess its progress towards addressing this issue at future inspections.

Were the reported activities covered by the authorities (first and second inspections)

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

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

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

From an examination of the information contained in the effectiveness reports at both inspections, nothing indicated that the AFP had not complied with the authorities in the majority of cases. However, at the first inspection, we were unable to determine if the AFP had engaged in conduct in accordance with two authorities. At the second inspection, it appeared that the AFP conducted activities that were not authorised under one authority. The AFP self-disclosed this issue.

In relation to the first inspection, the effectiveness report for one authority did not contain the time that the controlled conduct began under the authority. The conduct began on the same day the authority was given. The AFP self-disclosed another authority where the effectiveness report did not contain the date/s on which controlled conduct occurred under this authority. Therefore, we could not determine compliance with these authorities. In response to these findings, the AFP agreed to provide clearer information in future effectiveness reports.

In relation to the second inspection, one authority was varied to allow additional activity. However, the available information indicated that the law enforcement participants had engaged in that activity prior to the variation taking place.

The AFP subsequently varied the authority to ensure that the additional activities were covered. The AFP recognises that the variation cannot operate retrospectively to cover the possibly unlawful conduct that had already occurred.

Written records of urgent authorities (first and second inspections)

Under s 15GL, the authorising officer must, within seven days of granting an urgent authority (which is usually granted verbally), issue a written record of the urgent authority and give it to the principal law enforcement officer for the controlled operation. The urgent authority must comply with s 15GK(2).

At both inspections, we noted a total of four cases where the written record of the urgent authority was not made within seven days, and therefore, did not meet the requirement under s 15GL. Three of these cases were self-disclosed by the AFP.

The AFP has advised that it will continue to take steps to reinforce this requirement with its staff.

Urgent application made for a controlled operation where the previous application was also urgent (first inspection)

Section 15GH(3) of the Act requires that where 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.

We noted at the first inspection that the AFP granted an authority as a result of an urgent application. The previous application in relation to the same controlled operation was also an urgent application. The AFP self-disclosed this issue, and provided a file note which stated that a further urgent application was required because it was a critical timeframe for the AFP members to act without alarming the targets.

While we could see the reasons for the subsequent urgent application, the practice did not comply with s 15GH(3). There is also a possibility that the second urgent authority would be invalid and any conduct that occurred under this authority not protected.

The AFP advised that it will reinforce the requirement of s 15GH(3) through training.

Previous authorities relating to the same criminal activity (second inspection)

Section 15GH(4)(b) requires an application for an authority to state whether or not the proposed controlled operation, or any other controlled operation

with respect to the same criminal activity, has been the subject of an earlier application for an authority.

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

The AFP advised that its template for the application of an authority has a mandatory field which prompts investigators to record earlier applications. However, the AFP relies on the investigators' corporate knowledge to identify controlled operations relating to the same criminal activity, and the area within the AFP responsible for ensuring compliance with the Act does not have the means to verify this information.

While there was nothing to indicate that the AFP had not complied with s 15GH(4)(b), the lack of a uniform process to capture information about controlled operations that relate to the same criminal activity may lead to non-compliance. Therefore, we suggested that the AFP implement measures to mitigate this risk. The AFP advised that it is undertaking a process review to improve the management of this issue.

Agency reports to the Ombudsman

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

Six-monthly reports

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

The AFP submitted its first six-monthly report in July 2011 for the period 1 January to 30 June 2011 and the second report in March 2012 for the period 1 July to 31 December 2011. Apart from some minor administrative errors, both reports provided comprehensive and accurate records of the controlled operations authorised by the AFP in 2011.

Annual report

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

The AFP, in conjunction with the ACC and ACLEI, published the annual report in September 2011. The annual report provided comprehensive and accurate records of the controlled operations authorised by the AFP in 2011, which appeared to be consistent with the information provided by the AFP in its six-monthly reports. It also appeared that where the AFP excluded information from the annual report, it was for appropriate reasons.

AUSTRALIAN CRIME COMMISSION

Overview

Based on the results of the inspections conducted on 19 and 20 October 2011 (first inspection) and on 10 May 2012 (second inspection), the ACC was assessed as compliant with the requirements of Part IAB of the Act. Although no recommendations were made as a result of the inspections, a number of suggestions were made regarding how the ACC may better comply with Part IAB of the Act.

During the 2011-12 inspections, it was evident that the ACC had taken measures to address our previous recommendations and findings.

The ACC's progress in addressing previous recommendations

One recommendation was made to the ACC as a result of our inspections during 2010–11.

Recommendation: AAT Review

When seeking to conduct controlled operations beyond three months, that the Australian Crime Commission uses the process outlined under s 15GU of the Crimes Act 1914 to extend the authority through the AAT. Where this is not followed, that the Australian Crime Commission provides sufficient and reliable records to demonstrate why AAT review was not legally possible.

This issue was again noted at the first inspection. In February 2012 (prior to the second inspection), the ACC advised that it would amend its standard operating procedures to address this issue.

Discussion of issues identified in 2011-12

Duration of controlled operations and the need for AAT review (ongoing issue – first inspection)

Section 15GO(4) states that a formal authority must not be extended by an appropriate authorising officer so that its period of effect exceeds three months. To continue a controlled operation beyond three months, s 15GU requires that the law enforcement agency applies to a nominated member of the AAT.

If there are changes to the controlled operation, agencies may vary the authority internally under s 15GO before approaching the AAT to extend the authority. However, if there has been a significant alteration of the nature of the controlled operation, the authority must not be varied (s 15GO(5)), and consequently, the agency needs to apply for a new authority.

The main issue identified at the 2010-11 inspections (which was reported in last year's annual report) was the ACC's then practice of issuing new authorities to conduct the same controlled operation without applying to an AAT member for an extension.

In March 2011, the ACC adopted the practice of seeking AAT review where legally possible – that is, when the nature of the controlled operation is not significantly altered. However, the ACC considered that the term 'significant alteration' under s 15GO(5) was ambiguous and consulted with the AGD on this matter.

We considered that, at the very least, an agency may vary an authority when the variation falls under s 15GO(2) and is not considered a significant alteration of the nature of the controlled operation¹. We recommended to the ACC in our inspection report of August 2011 (from an inspection conducted in 2010-11), that when it issues a new authority to continue a controlled operation rather than seeking an extension from the AAT, it should keep reliable records to reasonably and sufficiently demonstrate why the change is considered a 'significant alteration' of the nature of the controlled operation.

On 17 January 2012, the AGD provided advice on what constitutes a 'significant alteration'. The advice was consistent with our views on this issue. In February 2012, the ACC advised AGD and Ombudsman officers that it would amend its standard operating procedures to reflect the AGD's advice. As such, we would expect to see all authorities issued after February 2012 follow the ACC's new practice and the AGD's guidance.

At the first inspection, conducted in October 2011, we noted three authorities that were granted by the ACC where it appeared legally possible to vary the previous authorities and then apply to the AAT for an extension. From available records at the inspection, these authorities were issued internally by the ACC within one day of previous authorities expiring, and appear to

¹ This includes extending the period of the authority (but not beyond three months); changing the participants (both law enforcement officers and civilians) in a controlled operation; and authorising additional or alternative controlled conduct for the participants in a controlled operation.

authorise what was effectively the same controlled operations as the previous authorities. We noted that two of these authorities were granted prior to the ACC adopting its revised practice in March 2011, and all authorities preceded the revised practices of February 2012.

In relation to these three authorities, we advised the ACC that we considered the changes made to the three authorities were capable of being the subject of a variation application. There were no available records to capture the basis on which the authorising officer decided that the changes amounted to a significant alteration of the nature of the controlled operation. Having considered the available records we further advised the ACC that the three authorities could be varied and extended rather than granting new authorities.

At the second inspection, conducted in April 2012, it appeared that the ACC did not issue any consecutive authorities. The ACC advised that its revised standard operating procedures had not yet been finalised for distribution to its staff. However, changes to its procedures have been communicated to staff.

Previous authorities relating to the same operation (second inspection)

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

As previously noted, 'criminal activity' is not defined in the Act, and it is our view that 'criminal activity' under s 15GH(4)(b) means the same or similar criminal offence, conducted in a similar manner by the same or related targets. This approach would inform an authorising officer, when considering an application, of the length of an operation or operations targeting related crimes and individuals.

At the inspection, we noted that the application for one authority did not refer to two previous authorities, although all of the authorities appeared to relate to the same criminal activities.

In response to this finding, the ACC advised that it has amended its procedures to prompt investigators to consider the requirements of s 15GH(4)(b). The ACC also noted our advice regarding the term 'criminal activity' and advised that it has included guidance to this effect in the relevant template.

Agency reports to the Ombudsman

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

Six-monthly reports

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

The ACC submitted its first six-monthly report in July 2011 for the period 1 January to 30 June 2011 and the second report in March 2012 for the period 1 July to 31 December 2011. Apart from one authority, where the six-monthly report incorrectly recorded the date when the controlled operation ceased, both reports provided comprehensive and accurate records on the controlled operations authorised by the ACC in 2011.

Annual report

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

As noted above, the ACC, in conjunction with the AFP and ACLEI, published the annual report in September 2011. The report provided comprehensive and accurate records of the controlled operations authorised by the ACC in 2011, which appeared to be consistent with the information provided by the ACC in their six-monthly reports. It also appeared that where the ACC excluded information from the annual report, it was for appropriate reasons.

Alison Larkins
Acting Commonwealth Ombudsman