



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

**For the period 1 July 2017 to 30 June 2018**

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

AUSTRALIAN FEDERAL POLICE

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

**January 2020**





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Inquiries regarding the licence and any use of this report are welcome at:

Commonwealth Ombudsman

Level 5, 14 Childers Street

Canberra ACT 2600

Tel: 1300 362 072

Email: [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

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## OVERVIEW

This report presents the results of inspections of the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP), conducted by the Office of the Commonwealth Ombudsman (the Office) under Part IAB of the *Crimes Act 1914*, for the period 1 July 2017 to 30 June 2018.

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, ACLEI, the ACIC and the AFP may grant an authority to authorise a controlled operation. Participants involved in such 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, providing that conditions are met.

The Office provides independent oversight of agencies' use of these powers by conducting inspections. At these inspections, we assess whether the agencies are compliant with Part IAB and had processes in place to support compliance. We also consider agencies' transparency and accountability, and encourage agencies to disclose issues to our Office. Where we or the agency identify issues, we focus on the actions taken by the agency to address them. We also follow-up on actions agencies have taken to address issues identified at previous inspections.

For 2017–18, we inspected a sample of authorities that the ACIC and the AFP reported had expired or were cancelled between 1 January and 31 December 2017. In our previous annual report, we noted instances where these agencies may not have granted a valid authority to conduct a controlled operation, and where participants or activities of controlled operations may not have been authorised, as they were not identified on the relevant authority. We considered that these instances of non-compliance presented a high level of risk and were an area of focus for inspections conducted in this reporting period. At both agencies, we again identified instances where participants or activities of controlled operations may not have been authorised. Notwithstanding this, there was a reduction in the number of instances, and we are satisfied that both agencies have appropriate procedures in place to achieve compliance.

For ACLEI, we inspected all authorities it reported had expired or were cancelled during the same period. We did not identify any significant non-compliance issues.

## **INTRODUCTION**

Part IAB of the *Crimes Act 1914* (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.

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.

To ensure an appropriate level of transparency, Part IAB imposes a number of reporting obligations on agencies.

### ***What we do***

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 have 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 Ombudsman's inspections conducted between 1 July 2017 and 30 June 2018.

In this report, the Ombudsman must also 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***

The Ombudsman is required to monitor the activities of the ACLEI, ACIC and AFP. The Ombudsman must also inspect the ACIC's records to determine the extent of its compliance with corresponding State controlled operations legislation, if the ACIC has used them.

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

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

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

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.

We focus our inspections on areas of high risk and take into consideration the impact of non-compliance.

We assess compliance based on the records made available at the inspection, discussions with relevant agency staff, observations of agencies' processes through information they provide and agencies' remedial action 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 to identify and present the best sources of information to demonstrate compliance.

We encourage agencies to disclose any instances of non-compliance to our Office and inform us of any remedial action the agency has taken, both at and between inspections. At the end of each inspection we provide our preliminary findings to the agency to enable it to take any immediate remedial action.

We may also assist agencies to maximise compliance by 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 Part IAB by the agency and its law enforcement officers. We use the following criteria, and consider the following questions to assess compliance:

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

Further details can be found at **Appendix A**.

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

To ensure procedural fairness, we give agencies the opportunity to comment on our draft findings. Once we have considered and, where appropriate, incorporated the agency's response, the inspection results are considered finalised. The findings from these reports are de-sensitised and form the basis of our Office's report to the Minister.

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 provided by agencies.

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 may not report on administrative issues or instances of non-compliance where the consequences are negligible.

### ***Changes to our inspection approach***

During the 2017-18 period we varied our approach to inspecting controlled operation authorities, by inspecting a sample of authorities at the ACIC and AFP rather than all eligible authorities. At the AFP and ACIC, we focussed on authorities that reached 24 months, the maximum permitted period under Part IAB of the Act, as well as other authorities that appeared to be more complex and present greater risks to compliance. The complexity of these authorities increased the amount of time it took to assess compliance. Due to ACLEI's lower use of these powers, we were able to inspect all authorities issued by ACLEI in the inspection period.

In assessing these records, we found that the post-operation reports and other records available to us did not always contain sufficient detail for us to assess whether all participants and activities involved in a controlled operation were covered by an authority. Where agencies are unable to provide detailed or contemporaneous documentation about the activities engaged in during the course of a controlled operation, we may not be able to confidently assess the operation or determine if all participants or activities were authorised. During the course of our inspections we provided feedback to agencies where the available information was insufficient to enable a complete assessment.

### ***Revised assessment of variations to authorities***

Part IAB provides for controlled operation authorities to be varied in certain circumstances. Under Part IAB, authorising officers must not grant a variation of authority where doing so would constitute a significant alteration to the nature of the controlled operation (see s 15GO(5)).

The Explanatory Memorandum explains this provision as follows:

*‘Subsection 15GO(5) will provide that a variation cannot be granted unless the appropriate authorising officer is satisfied on reasonable grounds that the variation will not authorise entirely new and different operations. This will be a safeguard against the use of variation applications to authorise entirely new and different operations. This authorising officer will be required to consider whether the variation is consistent with the character of the originally authorised controlled operation. If a significant change to the nature of the operation is required, an application for a new controlled operation should be made under new section 15GH.’<sup>1</sup>*

In our previous annual report, we premised our assessments on the basis that a significant alteration to an authority would be one that authorised operations targeted at a different criminal activity. For example, where a controlled operation relating to drug offences was varied to include offences relating to the illegal importation of tobacco or dealing in the proceeds of crime. Based on our discussions with agencies following our 2017—18 report findings, we reviewed our approach to assessing variations having regard to the legislative provision, the explanatory memorandum and the operation of s 15GO in practice.

On reflection we consider our previous approach to s 15GO, reflected in our previous annual report, was unnecessarily narrow.

On this basis, we will now broaden our approach to look at whether the variation is consistent with the *character* of the original authorised controlled operation. We have advised the agencies of this approach, and explained that we will rely on agencies keeping contemporaneous records, internal advice and discussions with relevant staff to demonstrate their considerations regarding variations.

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<sup>1</sup> Explanatory Memorandum to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2009*.

## **AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY**

During 2017—18 we conducted two inspections at ACLEI and assessed three controlled operations authorities.

We conducted the first inspection from 9 to 10 November 2017, during which we inspected the records relating to two authorities that expired or were cancelled between 1 January and 30 June 2017. We conducted the second inspection from 21 to 22 May 2018, at which time we inspected one authority that was cancelled between 1 July and 31 December 2017.

### ***Issues from previous inspections***

We did not inspect ACLEI's controlled operations records in 2016—17, as ACLEI advised that no controlled operations authorities expired or were cancelled from 1 January to 31 December 2016. It was also not necessary to monitor ACLEI's progress in relation to previous findings, as no compliance issues were identified during 2015—16.

### ***Findings from 2017—18***

We did not identify any compliance issues at our inspections in 2017—18. We noted a number of good administrative practices during our inspections, for example ACLEI's contemporaneous record keeping for each controlled operation.

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

Section 15HM 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 the report must include.

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 reports under s 15HM for the periods 1 January to 30 June 2017 and 1 July to 31 December 2017 to our Office, and its 2016—17 annual report, in accordance with Part IAB. We were satisfied that the required information was included in all reports, except in two instances in the 1 July to 31 December 2017 six-monthly report where information was incorrectly recorded. ACLEI provided an amended report to the Minister and our Office for the 1 July to 31 December 2017 period, which rectified the incorrect information we had identified.

## AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

During 2017—18 we conducted two inspections at the ACIC, where we assessed 30 of its 52 controlled operations authorities. The ACIC advised that it did not use any corresponding State and Territory controlled operations legislation during 2017—18.

We conducted the first inspection from 29 November to 1 December 2017, during which we inspected the records relating to 15 of the 21 authorities that expired or were cancelled between 1 January and 30 June 2017. We conducted the second inspection from 18 to 20 April 2018 and inspected 15 of the 31 authorities that expired or were cancelled between 1 July and 31 December 2017. We also attended the ACIC on 6 June 2018 to review additional information to complete the inspection.

For these two inspections, we assessed authorities that presented the highest risk rather than inspecting all authorities that expired or were cancelled in the period. Higher risk authorities are those that relate to complex and long-running controlled operations, such as those that had been varied or extended multiple times or that involve a significant number of participants.

During our first inspection in November 2017, we identified a number of authorities where the information in post-operation reports was not sufficiently detailed. For those controlled operation authorities we were unable to determine whether participants and activities were covered by the authorisation. At the second inspection in April 2018, we noted that the ACIC changed its administrative practices to ensure that appropriate detail was captured in post-operation reports. It had also retrospectively applied these practices to some of the authorities we had difficulty assessing during the November 2017 inspection.

### ***Issues from previous inspections***

We identified a number of issues during our 2016—17 inspections regarding whether activities engaged in during a controlled operation were authorised. We identified similar issues during our 2017—18 inspections.

During 2016—17, we also identified one instance where the ACIC had granted an urgent controlled operations authority for an operation previously subject to a formal authority, contrary to s 15GH(3). This issue was not identified at our 2017—18 inspections.

## **Findings from 2017–18**

### ***Finding 1 – Unauthorised participants and activities of controlled operations***

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

Sections 15HA and 15HB provide protection from criminal and civil liability for participants that engage in conduct during the course of a controlled operation. If a participant's conduct is not authorised, this protection may not apply and the participant may be open to criminal and civil liability for their actions.

The Part imposes additional requirements for civilian participants under s 15HA(2), requiring that any controlled conduct is detailed on the authority and conducted under the instruction of a law enforcement officer.

#### **What we found**

In five instances at the November 2017 inspection we were unable to assess whether activities and participants involved in a controlled operation were authorised by an authority due to insufficient detail in the ACIC's post-operation reports.

In two of those instances, we reviewed additional information at our next inspection in April 2018 that confirmed the activities and participants were authorised.

In two other instances there was insufficient information in the ACIC's records about what activities were conducted by law enforcement officers including what time the conduct commenced. As a result we were unable to assess whether all participants and activities were authorised.

In the remaining instance, we were unable to determine whether a civilian participant had acted at the direction of a law-enforcement participant.

We did not identify any further instances during the April 2018 inspection as the ACIC implemented improved practices in January 2018 that were retrospectively applied to relevant records from the period 1 July 2017 to 31 December 2017.

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

In response to these findings, the ACIC advised that it had retrospectively prepared a log for these authorities which contained additional information in relation to the conduct undertaken. We reviewed the additional information at our inspection in May 2019 and the results will be included in our 2018—19 Annual Report.

## ***Finding 2 - Granting of two authorities for the same operation***

### **What Part IAB provides**

Sections 15GO and 15GU state the requirements to vary an existing authority for a controlled operation. Under s 15GO(2) a variation may:

- extend the period of effect of an authority
- authorise additional persons to engage in specified controlled conduct under an authority
- provide that specified persons are no longer authorised to engage in controlled conduct for the purposes of a controlled operation
- authorise existing controlled operation participants to engage in additional or alternative controlled conduct.

Section 15GO(5) states that an authority must not be varied unless an authorising officer is satisfied, on reasonable grounds, that the variation will not authorise a significant alteration of the nature of the controlled operation, including an alteration that would change the nature of the criminal offences to which the controlled operation relates.<sup>2</sup>

Section 15GO(4) states that a formal authority must not be varied in such a way that the period of effect of the authority will, after the variation is made, exceed three months, including any previous extensions. In circumstances where it extends the total period of effect of an authority beyond three months, an application must be made to an Administrative Appeals Tribunal (AAT) member under s 15GU(1). Alternatively, where it is possible to vary an authority under s 15GO(2) and in accordance with s 15GO(5), the ACIC should do so, rather than issuing a new authority.

### **What we found**

The ACIC disclosed that it had inadvertently issued two controlled operations authorities for the same operation resulting in the operations being assigned the same reference number. This second authority was issued to correct an error in the original authority where a participant had been omitted.

The authorising officer believed that the subsequent authority would supersede the original authority. We advised the ACIC that the original authority could either have been varied under s 15GO to include the participant who was omitted or alternatively, the authority could have been cancelled in line with the provisions of s 15GY.

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<sup>2</sup> Section 15GK(1)(d) states that an authority must identify the nature of the criminal activity (including the relevant suspected offences) in respect of which the controlled conduct is to be engaged.

The ACIC acknowledged that, contrary to its usual practice, these authorities were not vetted by the legal team. It also advised that the original authority should have been cancelled under s 15GY.

### ***Finding 3 – Consecutive authorities***

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

Section 15GO(4) states that a formal authority must not be varied in such a way that the period of effect of the authority will, after the variation is made, exceed three months, including any previous extensions. In instances where it extends the total period of effect of an authority beyond three months, an application must be made to an AAT member under s 15GU(1).

#### **What we found**

We identified one authority that targeted the same criminal activities and person of interest as a previous authority. This authority had been granted within six days of the expiry of the previous authority. Based on available information, it was unclear why the ACIC did not seek to extend the original authority by applying to the AAT.

#### **The ACIC's response and our position**

The ACIC noted that it had originally expected that this operation would cease in line with the expiry of the first authority. However, the day before the expiry of the authority, additional information became available that changed the operational circumstances. In that regard, the ACIC advised that if such information were available earlier, it would have followed its standard procedure of applying to the AAT for an extension.

We originally advised the ACIC that it could have relied on s 15GO to extend the authority. However, in light of the ACIC's advice, we accept that the circumstances were such that it was not possible to extend the authority. We also note that it had earlier applied for, and been granted an extension for the original authority.

### ***Finding 4 – General register and record keeping matters***

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

Under s 15HQ, an agency must keep a general register, specifying certain details about each controlled operation. For example, under s 15HQ(2)(b)(viiiia), the general register must specify the nature of the controlled conduct engaged in by law-enforcement participants.

Section 15HP(h) requires the agency to keep each written document given under s 15GR(2) in relation to a variation of an authority by an authorising officer.

### **What we identified**

In assessing the ACIC's general register against the requirements of s 15HQ, we were satisfied the required information was included in the general register, except for the following:

- Eight instances at the November 2017 inspection and five instances at the April 2018 inspection, where specific details were either incorrectly recorded or omitted.

We identified two instances where the ACIC had not met the record keeping requirements of s 15HP(h). In the first instance, a signed formal variation was not linked to an authority either in the relevant files or the ACIC's reports. In the other instance, the ACIC disclosed that it was unable to locate the signed original variation to an authority or copies of this variation. In the absence of this information, we assessed secondary records to confirm that the variation had been made appropriately.

While these non-compliances are of an administrative nature and do not affect the validity of authorities issued, Part IAB has strict record keeping requirements to ensure transparency and accountability in the use of controlled operations authorities.

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

The ACIC advised that it has updated its general register and has also revised relevant guidance material to reinforce record-keeping obligations and implemented additional measures to improve its reporting.

### ***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 preceding six months. This section also sets out the details the report must include.

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.

The ACIC submitted its six-monthly reports under s 15HM for the periods 1 January to 30 June 2017 and 1 July to 31 December 2017 to our Office, and its 2016—17

annual report, in accordance with Part IAB. We were satisfied that the required information was included in all reports, except for the following:

- Eight instances in the 1 January to 30 June 2017 six-monthly report, and two instances in the 1 July to 31 December 2017 six-monthly report, where information was either omitted or incorrectly recorded.
- Five instances in the 2016–17 annual report where information was omitted.

The ACIC advised that it has since implemented remedial measures to address these reporting issues. These measures included allocating an additional staff resource, creating new templates and updating procedures.

## **AUSTRALIAN FEDERAL POLICE**

During 2017—18 we conducted two inspections at the AFP, where we assessed 75 of its 146 controlled operations authorities.

We held the first inspection from 23 to 27 October 2017, during which we assessed records relating to 57 of the 82 authorities that had expired or were cancelled between 1 January and 30 June 2017. We held the second inspection from 3 to 6 April 2018, and inspected 18 of the 64 authorities that had expired or were cancelled between 1 July and 31 December 2017.

For the second inspection, we revised our approach and inspected authorities that presented a higher risk, rather than inspecting every authority granted by the AFP. We focussed on inspecting records relating to complex and long-running controlled operations, for instance, those that had been subjected to numerous variations and extensions or those that involved significant numbers of participants.

### ***Issues from previous inspections***

During 2016—17 we noted several instances where participants and/or activities of controlled operations were not authorised. Although the AFP has made ongoing efforts to remediate the occurrence of these issues, we continue to see this issue during our inspections. In 2017—18 we identified instances of participants or activities of controlled operations not being authorised but the number of instances was markedly decreased on previous years.

During 2016—17, the AFP did not vary authorities in a manner provided for under Part IAB. In those instances, the AFP either applied for new authorities when the original authorities could have been varied or varied authorities in circumstances where a new authority should have been sought. We identified this issue again during 2017—18.

### **Findings from 2017—18**

#### ***Finding 1 – ‘Standing’ major controlled operations authorities***

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

Section 15GD(2)(b) defines a major controlled operation as a controlled operation that is likely to continue for more than three months. The AFP is the only agency that may grant a major controlled operation authority.

In accordance with s 15GH(4)(a), an application must provide sufficient information to enable the authorising officer to decide whether or not to grant the application.

Under s 15GI(2)(c) an authorising officer must not grant an authority to conduct a controlled operation unless satisfied on reasonable grounds that any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation.

Under s 15GU(1), where an authority is to be varied to extend the period of effect to three months and beyond, an application must be made to an AAT member.

## **What we found**

During the inspection we identified two major controlled operations authorities, granted on the same day, which targeted specific serious offences the AFP considered were likely to occur in the future. These were intended to provide standing coverage in the event that an opportunity for the authorised controlled conduct arose. Due to the specific nature of the proposed conduct and the serious offences targeted, the AFP considered that any delay may have affected the success of the operation. These were internally referred to as 'standing' or 'blanket' major controlled operations.

At the inspection, we noted that the two standing authorities granted by the AFP authorised a large number of participants to engage in conduct relevant to the operation. This approach was contrary to internal guidance we sighted at the inspection.

In our view, authorities of this nature should be limited to the minimum number of participants necessary to conduct an effective controlled operation. This will assist the authorising officer to be satisfied, on reasonable grounds, that any unlawful conduct involved in conducting the controlled operation is limited to the maximum extent, as required under s 15GI(2)(c). We suggest that the AFP consider whether the urgent provisions in the Act would be more appropriate when applying for controlled operations of this nature (s 15GH(2)(b)).

### Ancillary considerations

In relation to standing major controlled operation authorities, we identified that the AFP intended to apply, at a later stage, for a separate major controlled operation authority to cover additional related offences. It would apply for this authority in the event that the investigations outlined in the original authority proceeded beyond the initial phase, in turn necessitating additional controlled conduct.

Although the subsequent operation would be inherently linked to the original scoping authority, it is our understanding that such an operation would generally include significantly altered controlled conduct (and different or additional offences) that would likely preclude an amendment to the original authority.

Where the AFP does grant such authorities, records should reflect the link between the new authority and the original authority and establish the basis on which an amendment to the original authority was not possible.

In our view standing controlled operation authorities should be used sparingly and with limited scope to ensure that the authorising officer can be satisfied on reasonable grounds of all the requirements in s 15GI(2)(a)-(h) at the time of granting the authority.

## ***Finding 2 – Authorities not varied in accordance with Part IAB***

### **What Part IAB provides**

Sections 15GO and 15GU state the requirements to vary an existing authority for a controlled operation. Under s 15GO(2) a variation may:

- extend the period of effect of an authority
- authorise additional persons to engage in specified controlled conduct under an authority
- provide that specified persons are no longer authorised to engage in controlled conduct for the purposes of a controlled operation
- authorise existing controlled operation participants to engage in additional or alternative controlled conduct.

Section 15GO(5) states that an authority must not be varied unless an authorising officer is satisfied, on reasonable grounds, that the variation will not authorise a significant alteration of the nature of the controlled operation.

Section 15GO(4) states that a formal authority must not be varied in such a way that the period of effect of the authority will, after the variation is made, exceed three months, including any previous extensions. In circumstances where it extends the total period of effect of an authority beyond three months, an application must be made to an Administrative Appeals Tribunal (AAT) member under s 15GU(1). In our view, where it is possible to vary an authority under s 15GO(2) and in accordance with s 15GO(5), the AFP should do so, rather than issuing a new authority.

### **What we found**

During our October 2017 inspection, we identified a number of instances where new authorities were granted when it appeared it was possible for the original authority to have been varied.

### ***Finding 3 – Participants or conduct not authorised by authority***

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

Sections 15HA and 15HB of the Act provide protection from criminal and civil liability for participants that engage in controlled conduct during the course of an operation, if certain conditions are met. If a participant's conduct is not authorised, this protection may not apply and the participant (a law enforcement officer or a civilian) could be open to criminal or civil liability for their actions.

Section 15GI(2)(c) requires that authorised officers must not grant an authority unless they are satisfied on reasonable grounds that any unlawful conduct involved in the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation.

Section 15GO allows for an authority to be varied to authorise participants to engage in additional or alternative controlled conduct. Section 15GP(3)(b) provides for urgent variation applications to be made orally in person, or by telephone, in certain circumstances.

#### **What we found**

During the inspection we identified:

- two instances where it appeared, based on available information, a law enforcement officer engaged in activities not specified on the authorisation
- one instance where conduct occurred prior to being authorised.

#### ***Conduct contrary to the authority***

We identified one authority where, in the course of the authorised controlled operation, a law enforcement officer engaged in activities with a class of persons in a location not specified on the authority.

We acknowledge the AFP experienced difficulty in anticipating the scope of activities that may be involved in the operation, specifically regarding the class of persons and their location. It appears that in limiting the scope of the original authority, the AFP had not contemplated circumstances where engagement may inadvertently occur with persons in a location other than was initially intended.

However we note that, by limiting the scope of the authority, the AFP actively demonstrated considerations in respect of s 15GI(2)(c), where an authorised officer is to be satisfied that any unlawful conduct will be limited to the maximum extent possible.

### ***Conduct prior to variation of authority***

Under the same operation, we also noted one instance where it appeared a law enforcement participant engaged in additional controlled conduct not included on the original authority, several hours before the urgent variation authorising that controlled conduct was granted.

We consider that where there is a reasonable expectation that such conduct may occur, it is prudent to include potential activities on the authority or, where practicable, apply the urgent variation provisions under s 15GP.

### ***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 preceding six months. This section also sets out the details the report must include.

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. The AFP submitted its six-monthly reports under s 15HM for the periods 1 January to 30 June 2017 and 1 July to 31 December 2017 to our Office, and its 2016–17 annual report, in accordance with Part IAB.

We were satisfied that the required information was included in all reports, except for the following:

- Two instances in the 1 January to 30 June 2017 six-monthly report, and five instances in the 1 July to 31 December 2017 six-monthly report, where information was incorrectly recorded.

Despite these instances it is our view that the AFP has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

## APPENDIX A – INSPECTION CRITERIA AND METHODOLOGY

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

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

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

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| 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 AAT 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 AAT member's oversight and are they sufficient? | 1.1.4 What are the agency's procedures for cancelling authorities and are they sufficient? |
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#### 1.2 Were activities relating to a controlled operation covered by an authority?

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

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

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| 2.1.1 What are the agency's record keeping procedures and are they sufficient? Are records accurate and comprehensive? | 2.1.2 Does the agency keep an accurate general register? |
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#### 2.2 Were reports properly made?

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|--|---|
| 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? |
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#### 2.3 Was the agency cooperative and frank?

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| <ul style="list-style-type: none"><li>- Does the agency have a culture of compliance?</li><li>- Was the agency proactive in identifying compliance issues?</li><li>- Did the agency disclose issues?</li><li>- Were issues identified at the previous inspection/s addressed?</li><li>- Has the agency engaged with the Commonwealth Ombudsman's office, as necessary?</li></ul> |
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