



**Submission by the  
Commonwealth Ombudsman**

**INQUIRY INTO THE CRIMES LEGISLATION  
AMENDMENT (SERIOUS AND ORGANISED  
CRIME) BILL 2009 [PROVISIONS]**

Submission by the Commonwealth Ombudsman, Prof. John McMillan  
**July 2009**

# 1 INTRODUCTION

On 25 June 2009, the Senate referred the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill) to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) for inquiry and report by 17 September 2009. The Committee has invited submissions on the Bill by 31 July 2009.

The Explanatory Memorandum states that the Bill will amend a number of Acts as part of a comprehensive national response to combat organised crime. Included in the list of amendments is the current Part 1AB of the *Crimes Act 1914* (the Act) relating to controlled operations. The Bill seeks to implement, to a large extent, the national model laws on controlled operations, which were developed by the Joint Working Group of the Standing Committee of Attorneys-General and the then Australasian Police Ministers Council in 2003.

## 2 BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Since 2002, this office has inspected the records of the Australian Federal Police (AFP) and the Australian Crime Commission (ACC)<sup>1</sup> in relation to controlled operations to ensure compliance with Part 1AB of the Act.<sup>2</sup> The Ombudsman is responsible for reporting to Parliament annually on the Ombudsman's activities under the Act. The submission is informed by the Ombudsman's understanding of the operation of the provisions, gained from numerous inspections of the records of law enforcement agencies.

The proposed amendments will enhance this office's oversight function by providing stronger legislative powers for the Ombudsman in relation to inspections, and greater clarity with respect to the recordkeeping and reporting obligations of law enforcement agencies. As a result, the proposed legislation increases, and in some instances, changes the Ombudsman's responsibilities under the Act. These changes and our response to them are discussed below.

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<sup>1</sup> Previously the National Crime Authority.

<sup>2</sup> The Ombudsman is also required to inspect the records of the Australian Commission for Law Enforcement Integrity (ACLEI) should it use the controlled operations provisions in the Act.

## **3 COMMENTS ON PROPOSED AMENDMENTS**

### **3.1 Clarifying and strengthening the Ombudsman's powers**

The proposed legislation provides a clearer and more robust exposition of the powers of the Ombudsman in relation to his oversight role. For example, the proposed legislation explicitly provides the Ombudsman full and free access to records of an agency that are relevant to the inspection, and allows the Ombudsman to make copies of, and take extracts from, those records. The proposed legislation also sets out the Ombudsman's powers to obtain information from agencies and law enforcement officers. These provisions are not included in the current Act.

This office generally receives a high level of co-operation and assistance from law enforcement agencies throughout the course of an inspection. Notwithstanding this, by clearly stating the powers of the Ombudsman and providing increased powers for information gathering, the proposed amendments afford this office with a greater ability to ensure that our inspections are thorough and meaningful. These changes are strongly supported.

### **3.2 Recordkeeping and reporting by agencies**

To achieve thorough and meaningful oversight, the Ombudsman's powers need to be supported by provisions that mandate the keeping of appropriate records by law enforcement agencies. The proposed legislation supports this by:

- defining the procedures and documentation relating to the authorisation and conduct of controlled operations
- requiring at times the creation and retention of documentary evidence of compliance within each process.

For example, the proposed legislation sets out the process for both standard and urgent applications for authorities to conduct controlled operations, as well as the content requirements for applications and authorities. The proposed legislation also requires authorising agencies (AFP, ACC and ACLEI) to keep specific documents such as controlled operations applications and authorities.

However, there remain some areas, discussed below, where the Bill could better address the shortcomings of the current legislation. I also note that the Bill reduces, rather than strengthens, the requirement for the keeping of records relating to the handling of illicit goods.

#### **3.2.1 Outcomes of controlled operations**

We note that the model legislation, on which the Bill's provisions are based, makes provision for a principal law enforcement officer's report to be prepared and retained at the conclusion of a controlled operation. Although there is no requirement for such a report under the present legislation, we understand that the AFP does complete a report of this nature for its own purposes, which is made available to our office to facilitate our oversight.

Such reports would seem to provide an important tool for law enforcement agencies to assess their own performance in terms of the outcome of a controlled operation,

and would provide information necessary for this office to ensure that agencies are compliant with annual reporting and other requirements. It is disappointing that the requirement for a principal law enforcement officer's report under the model legislation has been omitted from the Bill.

My office had taken the opportunity to comment on various iterations of the Bill during its development and we have not previously raised this issue with the Attorney-General's Department. However, during recent inspections, it has come to our attention that there is generally a lack of easily accessible records to verify the outcomes of operations and particularly the handling and possession of narcotic goods during the operation.

The model laws require the principal law enforcement officer to make a report to the chief officer within two months after the completion of an operation. A report must include, amongst other things, the nature of the controlled conduct engaged in, details of the outcome of the operation, the nature and quantity of any illicit goods and the route through which the illicit goods passed during the operation. Similar provisions are found in controlled operations legislation in the ACT, NSW, Victoria and Queensland.

The principal law enforcement officer's report, as a source document, in conjunction with the general register, would provide a means to verify the accuracy of agencies' annual reports and the proper operation of the Act.

### ***3.2.2 Handling and possession of narcotic goods***

The current Act and the Bill both require an authorising officer, when authorising a controlled operation, to be satisfied on reasonable grounds that, to the maximum extent possible, any illicit goods will be under the control of an Australian law enforcement officer at the end of the operation. The clear intent is to limit narcotic goods passing out of the control of law enforcement agencies.

To provide assurance that this in fact happens, ss 15S(2)(e) and 15S(3) of the current Act require agencies to include information in a quarterly report on the handling of narcotic goods and the people who had possession of those goods.

The Bill will introduce significant changes to the reporting obligations of agencies, and detailed quarterly reports will be replaced by more rudimentary six-monthly reports. The changes recognise that my office has the power to look at records held by law enforcement agencies and that the present requirement to report very sensitive information creates an unnecessary and dangerous risk. The six-monthly report will allow my office to track the status of controlled operations, around which inspections activities may be planned.

My concern is that there is no provision in the Bill that requires information, which is presently reported under ss 15S(2)(e) and 15S(3) of the Act, to be recorded for the purposes of my inspections. I consider the making of a record on the handling of narcotic goods and the people who had possession of narcotic goods as part of a controlled operation, whether the record is reported or held by the agency, to be a fundamental safeguard against the loss or misappropriation of narcotic goods. This requirement should not have been omitted from the Bill.

In my opinion, the Bill should make provision for information relating to the handling of narcotic goods and people who had possession of narcotic goods to be recorded in the proposed general register.

### **3.3 Use of informants in controlled operations**

The current Act provides law enforcement officers and certain other persons in controlled operations with protection from criminal liability and indemnity from civil liability. The current provisions specifically exclude informants (on the basis that they may be involved in criminal activity) from such protection.

The Bill removes certain provisions from the current Act that will have the effect of extending protection under controlled operation certificates to informants. The benefits of this change are recognised in the Explanatory Memorandum – informants are more likely to assist if they receive legislative protection from criminal liability, and this will enable law enforcement agencies to obtain key information and evidence from controlled operations.

The changes have, in my view, the potential to increase the number of informants used in controlled operations, and also increase the number of authorised controlled operations. Use of informants can also add complexity and risk to an operation, and agencies would need to place a greater emphasis on the use of appropriate conditions and controls, particularly where informants' activities involve dealing with illicit goods. If the number of authorised controlled operations increases, so will the workload of this office.

### **3.4 Duration of controlled operations**

The proposed legislation places a maximum limit of 24 months on the duration of a controlled operation. This increases the maximum limit of six months in the current Act. The Explanatory Memorandum explains that the extension 'recognises that some controlled operations, particularly those investigating organised crime, may extend for a long period of time and it would cause significant disruption to the investigation, and possible risk to participants, if the operation was interrupted at a sensitive state'.

I do not have any particular view on the increased maximum duration of a controlled operation and accept that a shorter period may well be disruptive in some cases. However, the Committee should note that the increased duration of operations may impact upon inspections undertaken by this office.

To ensure the security of ongoing operations and safety for my staff, this office generally refrains from inspecting records of operations that are ongoing. If the maximum duration of a controlled operation is extended from six to 24 months, we would not be able to restrict our inspections to completed operations. To provide robust and contemporaneous oversight, the Ombudsman would be obliged to look at the records of controlled operations that are ongoing. Both my office and law enforcement agencies would need to work together to develop revised methodologies that facilitate such inspections while ensuring an appropriate level of security.

## **4 IMPACT ON RESOURCING**

Under the proposed legislation, State and Territory law enforcement agencies may undertake controlled operations under Commonwealth legislation. Use of the provisions by those agencies will be oversighted by this office. Oversight of the ACC's use of State or Territory legislation will also become a responsibility of this office, unless State or Territory legislation provides otherwise. Changes relating to informants and the duration of operations may also impact upon this office.

The Committee may wish to note that while there is no commitment to extra funding in relation to the additional functions, the Government has agreed that the Ombudsman's office should not be required to absorb any significant costs arising from the amendments, and the level of funding, if any, would be assessed in the light of emerging demand. Such funding would be provided to this office from the Attorney-General's portfolio with the agreement of the Minister for Finance and Deregulation.