



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

CONDUCTED BY THE
AUSTRALIAN CRIME COMMISSION
AUSTRALIAN FEDERAL POLICE
AUSTRALIAN COMMISSION FOR LAW
ENFORCEMENT INTEGRITY

Report by the Commonwealth Ombudsman
under Part 1AB Division 2A of the *Crimes Act 1914*

2007–08



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INTRODUCTION

Part 1AB of the *Crimes Act 1914* (the Act) prescribes the process of applying for, granting, and ending a controlled operation certificate. Where a controlled operation is authorised by such a certificate, Law Enforcement Officers (LEOs) and certain other persons are exempt from any criminal liability arising in the course of such an operation, and are indemnified from civil liability where certain conditions are met.

The Ombudsman has a number of inspection and reporting roles under the Act. Under s 15UB of the Act, the Ombudsman is required to inspect the controlled operations records of the Australian Federal Police (AFP), Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI) at least once every 12 months to examine their compliance with Part 1AB of the Act.

Under s 15UC(1) the Ombudsman must, as soon as practicable after 30 June each year, prepare a report of the Ombudsman's work and activities monitoring controlled operations during the preceding 12 months. Copies of the report are then provided to the President of the Senate and the Speaker of the House of Representatives for presentation to the Senate and the House of Representatives respectively.

Section 15UC(2) requires that the Ombudsman's annual report to Parliament also include comments on the comprehensiveness and adequacy of the reports provided to Parliament by each law enforcement agency.

Content of this report

This is the seventh annual report on the Ombudsman's activities in monitoring controlled operations. The report covers this office's activities in monitoring controlled operations during the period 1 July 2007 to 30 June 2008 and includes:

- an overview of the activities of this office and the methodology used to assess law enforcement agency compliance with Part 1AB of the Act, and the comprehensiveness and adequacy of the reports provided to Parliament by those agencies through the Minister
- an assessment of the levels of compliance demonstrated by the AFP, ACC and ACLEI with the requirements of Part 1AB of the Act
- comments on the comprehensiveness and adequacy of the reports provided to the Minister and to Parliament by those law enforcement agencies

- the recommendations made by the Ombudsman during the inspection period and a summary of the relevant agency responses to those recommendations.

Overview of agency compliance

During 2007–08 the AFP and ACC have continued to improve the comprehensiveness and quality of their records and compliance with the Act. In particular, both agencies have improved training for staff members in the requirements of the Act, and have introduced improved procedures for the management of controlled operations documentation, reporting and accountability mechanisms. Many of the issues brought to the attention of the agencies by this office have been addressed through these initiatives. This office also appreciates the continued cooperation of the agencies during the inspections and their constructive responses to addressing the issues identified.

Within the relevant inspection periods for 2007–08, ACLEI did not undertake any controlled operations which resulted in the creation of an eligible record. Consequently, an inspection of its records was not necessary within this financial year.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The Ombudsman is required to report to both houses of Parliament on the work and activities undertaken by this office during the period 1 July to 30 June each year. The primary purpose of this inspection function is to ascertain whether the agencies have complied with the requirements specified in Part 1AB of the Act relating to the authorisation, conduct and reporting of controlled operations.

While only one inspection of each law enforcement agency is required by the Act within this period, it is the practice of this office to conduct two inspections each financial year. This ensures more contemporaneous reporting of issues.

The first inspection is conducted soon after receipt of the quarterly report which is delivered mid-August, and examines eligible records from the inspection period of February to July. The second inspection is conducted soon after receipt of the quarterly report delivered mid-February, and examines eligible records from the inspection period of August to January.

An eligible record is defined as:

- an application for a controlled operation certificate made prior to or within the inspection period, that is declined or withdrawn within the inspection period, and records associated with that application

- a controlled operation certificate issued within the inspection period, where the controlled operation has ended within the inspection period, and records associated with that certificate
- a controlled operation certificate issued prior to the inspection period, where the controlled operation ended within the inspection period, and records associated with that certificate.

Inspections of the eligible records held by the AFP were conducted between 10 and 13 September 2007 and 25 and 29 February 2008. The records of the ACC were inspected once, on 15 April 2008, as the ACC did not hold any eligible records for the February to July inspection period.

There were a total of 64 eligible records held by the AFP and ACC, as represented in the table below. The Ombudsman inspected 100% of these records.

Table 1: Number of records inspected

AGENCY	FIRST INSPECTION PERIOD	SECOND INSPECTION PERIOD
Australian Crime Commission	0	2
Australian Federal Police	26	36
Australian Commission for Law Enforcement Integrity	0	0

Inspection methodology

When inspecting eligible records, this office considers two elements of controlled operations:

- (a) whether there is compliance with Part 1AB of the Act
- (b) the comprehensiveness and adequacy of reports to the Minister and Parliament.

Such an examination involves the identification of both compliance and best practice issues. Generally speaking, compliance issues are those inspection findings that indicate the requirements of the Act have not been followed in part or in full. Best practice issues are raised when the Act has been complied with, however, the records indicate that practices and procedures are not sufficiently robust to mitigate the risk of future non-compliance. A best practice issue may also relate to improving recordkeeping to provide evidence of compliance with the Act.

Compliance with Part 1AB of the Act

The inspection involved checking that:

- the application for a controlled operation certificate was made by a LEO to an appropriate authorising officer, meeting the requirements of s 15J
- the form and content of the application for a certificate met the requirements of s 15K
- all urgent applications were made in appropriate circumstances, were accompanied by sufficient information to enable an authorising officer to make a decision and met the requirements of s 15L
- certificates were issued on appropriate grounds under s 15M
- the form and content of the certificates met the requirements of s 15N
- any applications to vary certificates were made by a LEO to an authorising officer, the variation was appropriate and the documentation met the requirements of s 15NA
- the surrender of any certificate met the requirements of s 15O
- the termination of any certificate was carried out where appropriate and notice was given as required by s 15OA
- certificates did not extend beyond three months from the date of issue unless a nominated member of the Administrative Appeals Tribunal (AAT) had reviewed the certificate and decided that it should be in force for six months, and accurate and comprehensive information had been provided to the AAT member as required by s 15OB
- no certificate remained in force beyond the period prescribed by s 15P
- the Chief Executive Officer (CEO) of the Australian Customs Service (ACS) was notified where appropriate, and the notification met the requirements of s 15Q.

Comprehensiveness and adequacy of reports

The inspection to assess the comprehensiveness and adequacy of the quarterly and annual reports was conducted by:

- checking that quarterly reports were submitted to this office within the time frame specified in s 15UA
- examining the quarterly reports to determine whether they contained the information required by s 15R(1) and s 15S.

- examining the annual report to determine whether it contained the information required by s 15T(2) and excluded only that information allowed by s 15T(3) and (4)
- comparing the information contained within the file, quarterly report and annual report entries to ensure that the information was accurate and comprehensive
- considering the information provided to the Minister regarding the reasons that the AFP sought to have information excluded from the annual report under s 15T(4).

INSPECTION RESULTS

There was a high degree of compliance with the Act by both the AFP and the ACC. Five recommendations were made to the AFP. No recommendations were made to the ACC.

The combined annual report for the AFP and ACC for 2006–07 was inspected in this reporting period and feedback provided to each agency on their contribution. An assessment of the comprehensiveness and adequacy of the 2007–08 annual report will be included in the next annual report by this office on controlled operations.

A number of administrative issues requiring improvement were identified in the inspection reports to both the AFP and ACC. Where they did not result in recommendations, these issues are not reported here. The focus of this report is on issues of compliance with the Act.

AUSTRALIAN FEDERAL POLICE

Based on the results of the inspection conducted between 10 and 13 September 2007, the AFP was assessed as:

- (a) compliant with the requirements of Part 1AB of the Act
- (b) generally providing comprehensive and adequate information in quarterly reports to the Minister.

Based on the results of the inspection conducted between 25 and 29 February 2008, the AFP was assessed as:

- (a) generally compliant with the requirements of Part 1AB of the Act
- (b) generally providing comprehensive and adequate information in quarterly reports to the Minister

- (c) generally providing comprehensive and adequate information in the 2006–07 annual report.

AFP compliance issues

As outlined above, the AFP was assessed as generally compliant with the Act. However, some issues were identified which could benefit from management attention. In general, the AFP should ensure that:

- certificates detail, for each person who is not a LEO and is permitted to be involved in a controlled operation, the nature of activities covered by that certificate in relation to that person, as required by s 15N(2)(cc)
- the procedures for making urgent applications (which are permissible where the applicant has reason to believe that the delay caused by making an application under s 15K may affect the success of the operation) are only utilised where delay could affect the outcome of the operation
- quarterly reports identify any person who was originally, or has become, the target of a controlled operation as required by s 15S(2)(a) as well as an indication as to whether the person remained a target at the end of the controlled operation
- in relation to the content of quarterly reports, as outlined by s 15S(2)(e)(i), the quarterly report identifies the agency affiliation of any LEO who, in the course of the controlled operation, had possession of narcotic goods.

AFP improvements

Overall, the records held by the AFP provided a detailed and comprehensive record of controlled operations conducted under Part 1AB of the Act, and were of a high standard. The AFP continually refines and adds to its quality assurance mechanisms, and there was a noticeable improvement in the quality of records over the year, especially in relation to areas of previous best practice comment.

Recommendations to the AFP

First inspection

The following recommendations were made based on the results of the inspection of AFP records conducted between 10 and 13 September 2007.

Recommendation 1

Where a condition is imposed on the granting of a certificate, the AFP should ensure a written record is made in respect to actions taken that are necessary for the satisfaction of that condition, and that this record forms part of an auditable trail.

Recommendation 2

The AFP should ensure that the content of quarterly reports for controlled operations identify each person targeted by the operation, including those targets listed on the certificate and any new targets.

Second Inspection

The following recommendations were made based on the results of the inspection of AFP records conducted between 25 and 29 February 2008:

Recommendation 1

The AFP should ensure that the procedure outlined in s 15L for the making of an urgent application be reserved for situations where there is a real concern that delay could affect the outcome of an operation.

Recommendation 2

The AFP should continue to ensure that certificates identify each person who is not a LEO (a civilian) and is permitted to be involved in the operation, as required by s 15N(2)(cb), and may become involved in controlled conduct.

Recommendation 3

The Australian Federal Police should ensure that, where no LEO (or civilian) undertook any significant activity or they unsuccessfully attempted a fully substituted delivery, the quarterly or annual report more accurately describes the outcome, for example that 'no LEO (or civilian) acted in reliance of the certificate' rather than stating that 'no person was covered by the certificate'.

AFP responses

The AFP generally agreed with these recommendations and undertook to review the relevant policies and procedures to improve compliance.

AUSTRALIAN CRIME COMMISSION

Based on the results of the March 2007 inspection, the ACC was assessed as:

- (a) compliant with the requirements of Part 1AB of the Act
- (b) providing comprehensive and adequate information in quarterly reports to the Minister
- (c) providing comprehensive and adequate information in the 2006–07 annual report.

ACC compliance issues

The ACC was assessed as compliant with the requirements of the Act, and while this office provided the ACC with best practice feedback on a number of issues, no significant compliance issues were identified or recommendations made as a result of the inspection.

ACC improvements

The ACC records inspected by this office were of a high standard and reflect a continued commitment to procedural review and quality assurance.

One important area of improvement relates to recording the details of Covert Human Intelligence Sources (CHIS), otherwise known as informants. While this issue has been the subject of significant comment during previous reports, this office notes that the ACC has, since 2007, instigated a practice whereby the involvement of CHIS is acknowledged in applications, certificates and reports using a code. This allows for the involvement of such individuals to be recorded, while protecting their identities.

Recommendations to the ACC

No recommendations were made to the ACC.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

As previously mentioned, ACLEI did not conduct any controlled operations during the year. However, ACLEI provided the relevant quarterly reports to the Minister as required under the Act, and was assessed during the course of the year as:

- (a) providing quarterly reports within the time frame specified in s 15R that contained the information required by s 15R and s 15S.

Prof. John McMillan
Commonwealth Ombudsman