



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

FOR THE PERIOD 1 JULY 2020 TO 30 JUNE 2021

Report by the Acting Commonwealth Ombudsman,
Penny McKay,
under s 15HO of the *Crimes Act 1914*

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EXECUTIVE SUMMARY

This report presents the results of the Office of the Commonwealth Ombudsman’s (the Office’s) inspections of the Australian Criminal Intelligence Commission (ACIC), the Australian Commission for Law Enforcement Integrity (ACLEI) and the Australian Federal Police (AFP), under Part IAB of the *Crimes Act 1914* (Part IAB), between 1 July 2020 and 30 June 2021 (the reporting period).

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

The Office provides independent oversight of agencies’ use of these powers by conducting inspections and reporting its findings to the Minister for Home Affairs (the Minister). At each inspection, we assess whether an agency’s use of controlled operations during the relevant period was compliant with Part IAB and check the agency has processes in place to support compliance. We also check the agency’s progress in addressing issues identified at previous inspections.

During the reporting period we conducted 2 inspections each on ACLEI, the ACIC and the AFP’s use of Part IAB powers.

Table 1 – Summary of key issues identified during inspections

Agency	Summary of key issues identified
ACIC	Not maintaining written records for urgent applications and authorities Inconsistent level of detail in conduct logs Reliance on ancillary conduct provisions Civilian conduct not sufficiently particularised Issues with the General Register

Agency	Summary of key issues identified
ACLEI	<p>Not specifying controlled conduct on an authority</p> <p>Not keeping records to demonstrate controlled conduct was in accordance with an authority</p> <p>Insufficient information in applications for controlled operations authorities</p> <p>Issues regarding variations of authorities</p> <p>Issues with the General Register</p>
AFP	<p>Quality assurance issues</p> <p>Required considerations missing from applications for authorities and variations of authorities</p> <p>Condition on authority not adhered to</p> <p>Unauthorised activities</p> <p>Inaccuracy of conduct records</p> <p>Approved conduct not being reflected in written records</p> <p>Conduct not specified on authority</p> <p>Inconsistencies with urgent application processes</p> <p>Not identifying the route for illicit goods</p> <p>Issues with the General Register</p>

Part 1: INTRODUCTION – SCOPE AND METHODOLOGY OF INSPECTIONS

Introduction

- 1.1. Part IAB enables law enforcement agencies to conduct controlled operations. Controlled operations are covert operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence.
- 1.2. Where a controlled operation is authorised under Part IAB, participants are exempt from any criminal liability and indemnified from civil liability arising from their acts or omissions during the operation, provided certain conditions under Part IAB are met.
- 1.3. To ensure an appropriate level of transparency about how and when controlled operations are used, Part IAB imposes several reporting obligations on agencies.

Our oversight role

- 1.4. Under s 15HS of Part IAB, the Ombudsman must, at least once every 12 months, inspect the records of authorising agencies (ACLEI, the ACIC and the AFP) to determine the extent to which the agency and its officers complied with Part IAB.
- 1.5. Inspections of ACIC records must include determining the extent of its compliance with State and Territory controlled operations legislation, if the ACIC exercised those powers in the relevant period.
- 1.6. The Ombudsman must report to the Minister as soon as practicable after 30 June each year, on inspections conducted during the preceding 12 months. In this report, the Ombudsman must include comments on the comprehensiveness and adequacy of the reports provided by agencies to the Minister and the Ombudsman under ss 15HM of Part IAB.
- 1.7. Part IAB grants law enforcement agencies extraordinary powers. The Ombudsman's oversight role is important for ensuring that agencies approve and conduct controlled operations in accordance with Part IAB and are accountable for instances of non-compliance. The

Ombudsman’s reporting obligations under Part IAB provide transparency to the Minister and the public on the use of these covert powers.

How we oversee

- 1.8. The Office uses a set of inspection methodologies and criteria that we apply consistently across each inspection. These are based on legislative requirements and best practice standards. Further details of our inspection criteria are provided at **Appendix A**.
- 1.9. We assess compliance based on the records agencies make available at the inspection, discussions with relevant agency staff, observations of agencies processes and agencies remedial action in response to any issues they or we identify.
- 1.10. To ensure procedural fairness, we give agencies the opportunity to comment on our findings following an inspection. The findings from our inspection reports and agencies responses are desensitised and summarised to form the basis of the Ombudsman’s annual report to the Minister.
- 1.11. This report provides a summary of the most significant inspection findings regarding agencies compliance with Part IAB for the reporting period.
- 1.12. We may also report on issues other than instances of non-compliance, such as the adequacy of an agency’s policies and procedures, to ensure compliance with Part IAB. We generally do not report on administrative issues or instances of non-compliance where consequences are negligible.

Part 2: AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

- 2.1. We conducted 2 inspections of the ACIC during the 2020–21 period, the first from 30 November to 4 December 2020 (November 2020 inspection) and the second from 15 to 18 June 2021 (June 2021 inspection).
- 2.2. Due to limitations imposed by COVID-19, we did not conduct a planned inspection in May 2020. A sample of the records we were unable to inspect during the previous reporting period were inspected at our December 2020 inspection and are included in this report.
- 2.3. During 2020–21 we inspected a sample of controlled operations authorities that expired or were cancelled between 1 July 2019 to 31 December 2020. The ACIC advised it did not use State or Territory controlled operations legislation during the relevant records period.

Record type	Records made available	Records inspected
Urgent controlled operations authorities	8	8 (100%)
Formal controlled operations authorities	137	53 (38%)
TOTAL	145	61 (42%)

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

Issues from previous inspections

2.5. During 2019–20 we identified:

- one instance, and the ACIC disclosed 2 instances, where it was unclear whether participants and conduct were authorised under a controlled operation authority
- two instances where the ACIC granted urgent controlled operations authorities subsequent to other related controlled operations authorities, contrary to the limitations provided by Part IAB
- several controlled operations authorities which did not specify that law enforcement officers could direct civilian participants to undertake controlled conduct, and
- several instances where the General Register either did not include certain details, or the details contained were incorrect.

Significant findings from 2020–21

Written records for urgent applications and authorities

- 2.6. The ACIC's standard practice is for authorising officers to make contemporaneous records when they grant an urgent application. However, we found this did not generally include an outline of the considerations made by the authorising officer in determining the application.
- 2.7. In our November 2020 inspection we inspected all 5 urgent authorities for which records were made available by the ACIC. We identified 2 instances where there were no contemporaneous records of the urgent application or urgent authority on file. We identified 3 instances where there were contemporaneous emails on file confirming the urgent authority was granted with no outline of what information was before the authorising officer at the time the application was made or what considerations were made.
- 2.8. While subsequent written records of these authorities were made in line with the requirement under s 15GL of Part IAB, in the absence of contemporaneous records, we could not be satisfied the authorising

officer made all required legislative considerations at the time the authority was granted.

- 2.9. In our June 2021 inspection we inspected all 3 urgent authorities granted by the ACIC and found that contemporaneous notes recorded an inconsistent level of detail.
- 2.10. We also identified that the ACIC's procedures and training lacked clear guidance as to what information must be included in contemporaneous notes.
- 2.11. We suggested the ACIC implement a mechanism for contemporaneously and consistently capturing the information given to authorising officers in determining whether to grant an urgent authority.
- 2.12. In response, the ACIC undertook to review its existing urgent application process and documentation, and where applicable will implement new record-keeping requirements and training and guidance materials.

Inconsistent level of detail in conduct logs

- 2.13. Accurate and detailed conduct logs are critical records to assess whether conduct undertaken was authorised and therefore, that participants are protected from liability under ss 15HA and 15HB of Part IAB.
- 2.14. For several authorities we inspected in our November 2020 inspection we identified an insufficient, inaccurate and inconsistent level of detail in conduct logs. This included instances such as:
 - details of conduct engaged in not being included
 - discrepancies between the conduct type specified and the details of the conduct engaged in
 - insufficient details about the nature of activities, such as the purpose or content of specific communications
 - conduct being described in a generalised summary without sufficient detail to capture each instance of conduct engaged in.

- 2.15. While we saw a general improvement in the quality of conduct logs reviewed at our June 2021 inspection, we identified 6 further instances of similar issues.
- 2.16. We suggested the ACIC ensure conduct logs are accurately completed with sufficient detail to demonstrate compliance with the respective authority and the Act. The ACIC subsequently updated its training modules to address the level of detail required in conduct logs.

Reliance on ancillary conduct provision for unauthorised law enforcement participants

- 2.17. The ACIC disclosed one instance where a law enforcement officer engaged in ancillary conduct while not covered by a relevant authority. The ACIC's internal advice considered this conduct was covered by s 15HE of Part IAB. On review of this matter, we identified an additional law enforcement officer who was not considered by the internal advice who also engaged in conduct while not covered by the relevant authority.
- 2.18. Section 15HE of Part IAB only provides protection from criminal liability for ancillary conduct relating to controlled conduct. We suggested the ACIC seek advice regarding conduct not authorised for 2 controlled operations where the ACIC disclosed it had relied on ancillary conduct provisions to cover conduct engaged in by officers not listed on an authority and prior to an authority being granted. We also suggested the ACIC establish a policy on when s 15HE of Part IAB is enlivened and to ensure case-specific legal consultation occurs to protect persons engaging in ancillary conduct.
- 2.19. Following this suggestion, the ACIC updated its policy to require officers to seek advice before a person engages in conduct in reliance on ancillary conduct provisions. The ACIC also amended its quality assurance guidelines to ensure any such advice is captured within operational assurance documents.

Civilian conduct not sufficiently particularised

- 2.20. We identified several authorities where the conduct described for both law enforcement officers and civilian participants was identical, aside from additional authorised conduct for law enforcement

officers to direct civilian participants. In 3 instances, we found the conduct was not sufficiently particularised for civilian participants.

- 2.21. Sections 15GK(1)(f)(ii) and 15GK(2)(f)(ii) require an authority to specify the *particular* controlled conduct that each civilian participant may engage in, as opposed to the *nature* of the controlled conduct that law enforcement participants may engage in.
- 2.22. Where law enforcement participant conduct and civilian participant conduct will be the same, the conduct must be particularised to meet the civilian standard of specificity.
- 2.23. Particularising civilian participant conduct in applications also supports authorising officer considerations about whether any role assigned to a civilian participant in the operation is not one that could be adequately performed by a law enforcement officer as required by s 15GI(2)(h) of Part IAB.
- 2.24. We suggested the ACIC ensure its controlled operation applications and authorities particularise civilian participant conduct. We also suggested the ACIC update its quality assurance guidelines to consider whether civilian participant conduct is particularised. The ACIC undertook to update its checklists, guidelines and handbook accordingly.
- 2.25. The ACIC disclosed one instance of this issue reoccurring at the June 2021 inspection and we made a further suggestion regarding strengthening quality assurance processes. The ACIC advised quality assurance guidelines were updated and it would include prompts in its pre-vetting checklist to confirm civilian conduct is particularised.

General Register issues

- 2.26. To satisfy the General Register requirements under ss 15HQ(1) and 15HQ(2) of Part IAB, the ACIC maintains a Master Register and a General Register Folio (GRF) to record details relating to each controlled operation.
- 2.27. During both inspections we found several inconsistencies in the ACIC's record-keeping. This included instances such as:
 - an incorrect period of an authority's effect recorded in the GRF

- incorrect information recorded in the Master Register and GRF regarding the date controlled conduct commenced and ceased
 - a GRF that did not detail the route of illicit goods as required by the Act
 - the Master Register listing a different civilian participant to the respective application and authority
 - incorrect offence details being recorded in the Master Register.
- 2.28. We also identified the Master Register did not include fields to record specific information required under s 15HQ(2)(a)(iv) of Part IAB.
- 2.29. We made several suggestions, including for the ACIC to review its record-keeping quality assurance to ensure consistency, accuracy and completeness. The ACIC advised it was undertaking this review and updated the Master Register to prompt inclusion of the information required under s 15HQ(2)(a)(iv) of Part IAB.

Comprehensiveness and adequacy of reports

- 2.30. The ACIC submitted to our Office its 6-monthly reports under s 15HM for the periods 1 July to 31 December 2019, 1 January to 30 June 2020 and 1 July to 31 December 2020, and its 2019–20 annual report, in accordance with Part IAB.
- 2.31. During 2020–21 we inspected the ACIC’s 6-monthly reports for the periods 1 July to 31 December 2019, 1 January to 30 June 2020 and 1 July to 31 December 2020 as well as the 2019–20 annual report.
- 2.32. We found the 6-monthly reports for 1 July to 31 December 2019 and 1 January to 30 June 2020 did not include the cancellation statistics as required by s 15HM(2)(t) of Part IAB, however the information was included in the 2019–20 annual report. The ACIC issued addendums to correct this.
- 2.33. We also identified, and the ACIC disclosed, 5 instances of inconsistencies between the ACIC’s annual and 6-monthly reports and other records at our November 2020 inspection relating to conduct dates and a date of cancellation.

- 2.34. Following our suggestion, the ACIC issued addendums to the Minister but at the June 2021 inspection disclosed that one of the addendums contained a further error which would be corrected with an addendum to the next 6-monthly report.
- 2.35. At the June 2021 inspection we identified, and the ACIC disclosed, several errors affecting the accuracy of the 6-monthly report, including:
- an incorrect expiry date
 - incorrect information about when conduct occurred
 - incomplete lists of the target of the controlled operation
 - incorrect information about which participant was directed to engage in controlled conduct
 - incomplete information about the extent of the conduct engaged in.
- 2.36. The ACIC advised it would issue addendums addressing these errors.
- 2.37. Notwithstanding the issues outlined above, we consider the ACIC has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

Part 3: AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

- 3.1. We conducted 2 inspections of ACLEI during the 2020–21 period, the first from 9 to 10 September 2020 (September 2020 inspection) and the second from 2 to 4 March 2021 (March 2021 inspection).
- 3.2. Due to limitations imposed by COVID-19, we did not conduct a planned inspection in May 2020. A sample of the records we were unable to inspect during the previous reporting period were inspected at our September 2020 inspection and are included in this report.
- 3.3. During 2020–21 we inspected controlled operations authorities that expired or were cancelled between 1 July 2019 to 31 December 2020.

Record type	Records made available	Records inspected
Urgent controlled operations authorities	0	N/A
Formal controlled operations authorities	4	4 (100%)
TOTAL	4	4 (100%)

Issues from previous inspections

- 3.4. We last reported to the Minister on ACLEI’s compliance with Part IAB in our 2018–19 annual report. We did not identify any compliance issues at that time.

Significant findings from 2020–21

Specifying controlled conduct on an authority

- 3.5. During our inspections we identified there was an absence of detailed guidance in ACLEI’s templates and procedural documentation regarding how to structure the controlled conduct in an authority.

- 3.6. We identified 2 instances where conduct for civilian participants was not sufficiently particularised to meet the requirement under s 15GK(1)(f)(ii) of Part IAB.
- 3.7. We identified authorities which did not specify that law enforcement participants were authorised to instruct civilian participants to engage in the controlled conduct specified on the authority. There were 3 instances where the authority did not include a caveat that the conduct of civilian participants was limited to conduct at the direction of a law enforcement participant pursuant to ss 15HA(2)(e) and 15HB(e) of Part IAB.
- 3.8. In both inspection reports, we suggested ACLEI incorporate practical guidance in its procedural documentation and templates on how controlled conduct should be described in applications and authorities, and for ACLEI to revise the format of its controlled operation templates to ensure it includes explicit descriptions of controlled conduct that may be engaged in under the authority. ACLEI is now reviewing its controlled operations templates and internal guidance.

Keeping records to demonstrate controlled conduct was in accordance with an authority

- 3.9. ACLEI often undertakes controlled operations in conjunction with other agencies, and it is common for ACLEI's controlled operation authorities to involve participants from those agencies.
- 3.10. During our September 2020 inspection we found ACLEI did not keep adequate records of the controlled conduct undertaken by participants of other law enforcement agencies during joint operations for which ACLEI was the authority-bearing agency.
- 3.11. During our March 2021 inspection, we identified one instance where the records did not clearly demonstrate whether the conduct engaged in by officers of other agencies was adequately covered by the authority.
- 3.12. We suggested ACLEI maintain sufficient records of all controlled conduct engaged in under controlled operation authorities for which ACLEI is the responsible agency, including conduct involving participants from other agencies. ACLEI advised its standard operating procedures would be updated.

Ensuring sufficient information in applications for controlled operations authorities – limiting unlawful conduct

- 3.13. During our March 2021 inspection we found one instance where the application for a controlled operation authority did not specifically address the requirement under ss 15GI(2)(c) and 15GQ(2)(c) that any unlawful conduct would be limited to the maximum extent consistent with conducting an effective controlled operation.
- 3.14. We identified another instance where this requirement was addressed to some extent for a law enforcement officer participant, but not for the civilian participant.
- 3.15. Having identified a similar incident in our September 2020 inspection, we suggested ACLEI ensure all applications include the information required under ss 15GI(2)(c) and 15GQ(2)(c). ACLEI advised its standard operating procedures would be updated.

Issues regarding variations of authorities

- 3.16. During our September 2020 inspection, we reviewed all applications for a variation made to a nominated Tribunal member. We found there was no explicit information included to demonstrate that the operation would be conducted in a way that ensured that, to the maximum extent possible, any illicit goods would be under the control of an Australian law enforcement officer at the end of the controlled operation. Under s 15GV(2)(d) of Part IAB, this is a matter the Tribunal member must be reasonably satisfied of before granting a variation to an authority.
- 3.17. In one instance we found an application to vary sought to nominate a new principal law enforcement officer (PLEO), which is not a variation available under s 15GO(2) of Part IAB. Changes in PLEOs must be actioned by an instrument under s 15GM of Part IAB.
- 3.18. We suggested ACLEI provide specific training to officers using controlled operations powers and ensure proper nomination of replacement PLEOs under s 15GM of Part IAB. ACLEI advised its standard operating procedures would be updated.

General Register issues

- 3.19. During both inspections we found several omissions and inaccuracies in ACLEI's general register. This included instances such as:
- not listing all offences targeted by the operation
 - not listing the controlled conduct that law enforcement officers or civilian participants were authorised to engage in
 - not listing all authorised participants.
- 3.20. We also found ACLEI's General Register was missing a field to record information required under s 15HQ(2)(a)(iv) regarding the date of withdrawal of application.
- 3.21. We suggested ACLEI correct these errors and, as a matter of better practice, that ACLEI implement quality assurance processes to ensure details recorded in the General Register are accurate and comprehensive. In response, ACLEI advised it amended the General Register and adopted a quality assurance process for recording information in the register.

Comprehensiveness and adequacy of reports

- 3.22. We last reported on ACLEI's statutory reporting in our 2018–2019 annual report. Since that time, ACLEI submitted to our Office its 6-monthly reports under s 15HM for the periods 1 January to 30 June 2019, 1 July to 31 December 2019, 1 January to 30 June 2020 and 1 July to 31 December 2020. ACLEI also included this information in its 2018–2019 and 2019–20 annual reports, in accordance with Part IAB.
- 3.23. During 2020–21 we inspected each of these reports and did not find any discrepancies. We consider ACLEI has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

Part 4: AUSTRALIAN FEDERAL POLICE

- 4.1. We conducted 2 inspections of the AFP during the 2020–21 period, the first from 19 to 23 October 2020 and the second from 1 to 4 June 2021.
- 4.2. Due to limitations imposed by COVID-19, we did not conduct a planned inspection in May 2020. A sample of the records we were unable to inspect during the previous reporting period were inspected at our October 2020 inspection and are included in this report.
- 4.3. During 2020–21 we inspected a sample of controlled operations authorities that expired or were cancelled between 1 July 2019 to 31 December 2020.

Record type	Records made available	Records inspected
Urgent controlled operations authorities	8	5 (63%)
Formal controlled operations authorities	151	37 (24%)
TOTAL	159	42 (26%)

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

Issues from previous inspections

- 4.5. During 2019–20 we identified:
 - four instances where we were unable to determine whether activities undertaken by civilian participants were directed by a law enforcement officer

- several instances where required considerations were missing from applications for authorities and variations of authorities
 - one instance where the written record of an urgent variation application did not explicitly identify why the delay in making a formal variation application may have affected the success of the controlled operation
 - the General Register not including fields for all requirements under s 15HQ of Part IAB
 - two instances affecting the adequacy and comprehensiveness of reports.
- 4.6. Several of these findings reoccurred across the 2020–21 inspections. Following our October 2020 inspection, we considered the AFP should focus on addressing issues regarding compliance mechanisms and culture. The AFP had made significant progress in this respect by the June 2021 inspection.

Significant findings from 2020–21

Quality assurance issues

- 4.7. During our October 2020 inspection we identified several significant record-keeping inconsistencies and issues impacting areas of high risk which were not identified by the AFP’s quality assurance and vetting processes. We were concerned AFP staff providing quality assurance were not provided sufficient access to relevant records to identify instances of non-compliance.
- 4.8. The inconsistencies we identified indicated a systemic failure in the AFP’s approach to maintaining records to demonstrate compliance with Part IAB. We therefore recommended the AFP establish effective quality assurance measures to ensure it could identify instances of non-compliance with the Act.
- 4.9. The AFP had made positive changes to enhance its quality assurance processes by our June 2021 inspection. We reiterated our previous suggestion for the AFP to ensure officers undertaking quality assurance are provided with sufficient access to relevant records and information to identify instances of non-compliance affecting controlled operations. The AFP advised it is implementing processes to ensure quality assurance staff can access relevant records.

Required considerations missing from applications for authorities and variations of authorities

- 4.10. During our October 2020 inspection we found several instances where applications, variation applications and authorities for controlled operations did not address specific legislative requirements.
- 4.11. Noting that issues with applications and variations were also identified at the previous inspection, we recommended the AFP ensure all templates addressed required legislative considerations. In response, the AFP reviewed its controlled operations applications, authorities and variations and updated its templates.
- 4.12. At the June 2021 inspection we were satisfied with the action taken and considered the issue was likely resolved. We made further better practice suggestions to address inconsistencies between templates and guidance material. The AFP is currently reviewing all controlled operations templates and sought feedback from our Office. We will continue to liaise with AFP to provide compliance feedback as invited.

Condition on authority not adhered to

- 4.13. During our October 2020 inspection we identified one authority which was granted subject to a condition, as permitted under s 15GI(1) of Part IAB, that risk in relation to the project be reviewed formally every 30 days.
- 4.14. While there was conduct undertaken, the AFP advised it was insignificant. The AFP considered that no operational activity had occurred, therefore a risk review was not required.
- 4.15. The condition to review risk was not subject to any limitation that reviews only need be conducted where considered necessary based on operational activity. As such, the AFP did not comply with the conditions stated on the authority.
- 4.16. We could not identify any mechanism the AFP uses to monitor the compliance of controlled operations with conditions. We also confirmed the AFP did not keep records of which controlled operations were subject to conditions. As a result, we recommended the AFP review all 2019–20 controlled operation authorities with

conditions, determine if the conditions were adhered to and seek advice about the validity of the actions carried out under authorities where conditions were not adhered to.

- 4.17. At our June 2021 inspection we were satisfied with the review undertaken by the AFP and noted the AFP has now implemented regular review practices and formalised vetting processes to ensure conditions are adhered to.

Unauthorised activities

- 4.18. We identified 3 instances at the October 2020 inspection which required the AFP to seek further advice and clarification regarding whether participants had engaged in unauthorised controlled conduct. While we are satisfied from the subsequent information provided to us that there was no unauthorised conduct, the consequences of any errors in this context can be significant.
- 4.19. We suggested the AFP ensure that applications and controlled operation authorities accurately detail all conduct to be engaged in. The AFP advised this would be addressed as part of its templates, governance and record-keeping reviews. We will continue to monitor this issue at future inspections.

Accuracy of conduct records

- 4.20. The AFP completes a Final Effectiveness Report (FER) for each controlled operation undertaken. FERs are a key method for the AFP to demonstrate its compliance with Part IAB. We found that some FERs contained insufficient detail about the conduct undertaken during the controlled operation. This included instances where the FER contained only a general statement that conduct occurred between particular date ranges.
- 4.21. In several instances we found the description of the controlled conduct engaged in by law enforcement participants was general and not sufficiently detailed to allow a proper assessment of whether the conduct was permitted by the authority.
- 4.22. We also identified several inaccuracies in FERs, such as instances where participants engaged in conduct when the FER stated the participant did not engage in conduct or had no record of the conduct.

- 4.23. We were not confident the FERs were adequately prepared or sufficient for the AFP to rely on to demonstrate compliance. As a result, we made 6 suggestions, including:
- the AFP ensure it keeps sufficient and accessible records to demonstrate that any controlled conduct engaged in complies with conduct authorised under the controlled operation authority
 - the AFP develop mechanisms to ensure consistent recording of controlled conduct to support its ability to demonstrate compliance with the Act
 - the AFP review its quality assurance processes to ensure accurate and complete recording of information in FERs
 - the AFP amend guidance, including its FER template, to provide direct and clear examples about how conduct should be recorded for both law enforcement and civilian participants.
- 4.24. The AFP advised that quality assurance checks would be included within the FER vetting process for conduct records and that governance, template and vetting guides are being updated. These were in draft at our June 2021 inspection so we will monitor the effectiveness and implementation of these changes at future inspections.
- 4.25. At the June 2021 inspection we identified inconsistent record-keeping practices relating to conduct records. We made a further suggestion that the AFP ensure investigators are aware of the requirement to keep conduct records as well as which system to keep them in and how to identify them. We also suggested the AFP update FER templates to ensure examples guide staff to provide sufficient detail about the specifics of each instance of controlled conduct. The AFP has since developed a conduct log template and processes to ensure consistent messaging of associated reporting and record-keeping obligations.

Approved conduct not reflected in written records

- 4.26. We identified several instances where we could not determine that activities undertaken by civilian participants were under the direction of a law enforcement participant. This was largely due to a lack of

specificity in authorisations regarding certain participants' ability to provide instructions to civilian and undercover participants.

- 4.27. We suggested, as a matter of better practice, that the AFP consistently include statements within authorities regarding law enforcement participants' authority to direct civilian/undercover participants in relation to controlled conduct, and consistently state that civilian participants could engage in controlled conduct at the direction of a law enforcement participant.
- 4.28. The AFP subsequently adopted a position that instructions given by an undercover controller or law enforcement participant directing a civilian participant in their conduct are not to be included in applications or authorities. The AFP's rationale is that these actions would be protected from liability as ancillary conduct under s 15HE of Part IAB.
- 4.29. Our position remains that, where it is known that law enforcement officers will be instructing civilian participants when an authority is drafted, it is better practice for this aspect of the operation to be included in the authority. This would reduce uncertainty about the nature and particulars of the conduct that is authorised.

Conduct specified on authority

- 4.30. We identified several controlled operation authorities where the conduct described for both law enforcement and civilian participants was identical, and the requirement under s 15GK(1)(f) that the conduct for civilian participants be particularised was not met.
- 4.31. The AFP advised that it seeks to apply a higher standard to specifying the conduct for law enforcement participants than is required. It considers predicting specifically particularised conduct for civilian participants to be difficult.
- 4.32. Where law enforcement participant conduct and civilian participant conduct will be the same, the conduct must be particularised to meet the civilian standard of specificity.
- 4.33. Particularising civilian participant conduct in applications also supports authorising officer considerations about whether any role assigned to a civilian participant in the operation is one that could

not be adequately performed by a law enforcement officer as required by s 15GI(2)(h) of Part IAB.

- 4.34. We suggested the AFP ensure its controlled operation applications and authorities particularise civilian participant conduct. The AFP subsequently updated guidance materials and templates. We identified a further instance at the June 2021 inspection but consider it a legacy issue as the template updates were made after the date of that record.
- 4.35. Following the June 2021 inspection, we made a further better practice suggestion for the AFP to update their quality assurance vetting guidelines relating to applications and authorities to consistently reflect the particularisation guidelines. The AFP is reviewing its controlled operations governance arrangements and has sought feedback from our Office. We will continue to liaise with AFP to provide compliance feedback as invited.

Inconsistencies with urgent application processes

- 4.36. To guide urgent applications for a controlled operation authority, the AFP maintains an urgent application checklist to ensure all relevant matters required by the Act are addressed when making an oral application for a controlled operation authority.
- 4.37. We found this checklist did not address elements under ss 15GI(2)(c)–(f) of Part IAB, all of which are matters to which an authorising officer must be satisfied of before granting an authority. We also identified there was no prompt within any guidance to record the reasons why an urgent application was sought under s 15GP(3)(b) of Part IAB and why the delay caused by making a written application might affect the success of the controlled operation.
- 4.38. We identified a general lack of records in relation to the decisions of authorising officers on urgent applications. For 2 urgent authorities we were unable to locate any contemporaneous records from the authorised officers of their decision. Written records were provided several days after the urgent authority was granted in accordance with s 15GL of Part IAB.
- 4.39. In one urgent authority, we identified that the conduct for both law enforcement and civilian participants differed between the urgent

application and authority and the subsequent written record of application. We were satisfied the difference in wording did not affect the validity of the conduct undertaken in this instance. However, this highlights the risk of making records after an urgent application is made and authority granted. That is, there is a risk they may not reflect the exact information considered by the authorising officer at the time of granting the authority.

- 4.40. Following our October 2020 inspection, we made several suggestions including for the AFP to update its urgent application checklist to ensure all matters under s 15GI of Part IAB are addressed in an application and that guidance be updated to require applicants to set out why the delay caused by making a formal application may affect the success of the controlled operation. We also made a better practice suggestion for the AFP to maintain contemporaneous records of decisions made by authorising officers following the receipt of urgent applications for controlled operation authorities.
- 4.41. The AFP had made significant amendments to its urgent controlled operation checklist prior to our June 2021 inspection. We suggested several further amendments be made to ensure all relevant legislative considerations are addressed. The AFP is currently reviewing its controlled operations governance arrangements and templates and has sought feedback from our Office. We will continue to liaise with AFP to provide compliance feedback as invited.

Identifying the route for illicit goods

- 4.42. We identified one instance where a formal application did not provide any information regarding the foreign countries through which illicit goods had, or were likely to, pass through; the time, date and place and at which the illicit goods were likely to be dealt with by an officer of Customs; or the time, date and place where the illicit goods were likely to enter Australia, as required by ss 15GK(1)(k)(ii)-(v) of Part IAB.
- 4.43. We identified 3 instances where the details of illicit goods involved in an operation were addressed in an original authority with no information to indicate this was included with the applications for a variation.

- 4.44. We noted the AFP's template for original applications prompted the inclusion of this information, however the template for a variation application contains only a general prompt regarding illicit goods.
- 4.45. We also found AFP's guidance document for vetting controlled operations did not include express consideration of those requirements under ss 15GK(1)(k)(ii)-(v) of Part IAB.
- 4.46. We made 3 suggestions in relation to this issue, including for the AFP to document all information relating to illicit goods as required under s 15GK(1)(k) to the extent it is known. The AFP advised it would address these suggestions as part of its review into templates and governance arrangements and we were satisfied with the action taken when we inspected the AFP in June 2021.

General Register issues

- 4.47. At our October 2020 inspection we identified a lack of clarity around which records the AFP relied on to meet requirements for particular parts of the register. We also identified an associated risk that some details required to be kept were not captured and some inconsistent policy guidance.
- 4.48. We suggested the AFP review its processes and documentation to ensure it met requirements under s 15HQ of Part IAB and ensure policy guidance is clear. We were satisfied with the action taken by the June 2021 inspection.
- 4.49. At the June 2021 inspection we identified 4 inaccuracies affecting the AFP's general register:
- not listing all offences targeted by the operation
 - listing an additional offence not specified on the authority
 - incorrectly recording the time an authority was granted
 - incorrectly recording the date and time an urgent internal variation was granted.
- 4.50. We suggested the AFP correct these errors. The AFP advised this was completed.

Comprehensiveness and adequacy of reports

4.51. The AFP submitted to our Office its 6-monthly reports under s 15HM for the periods 1 July to 31 December 2019, 1 January to 30 June 2020 and 1 July to 31 December 2020, as well as its 2019–20 annual report. We inspected these reports during 2020–21.

4.52. We identified inaccuracies in the 6-monthly reports, including:

- two instances where the 6-monthly report incorrectly recorded the date an urgent authority was granted
- one instance where the 6-monthly report incorrectly recorded a date of cessation
- one instance where the FER, and subsequently the 6-monthly report, incorrectly recorded that no illicit goods were involved in an operation
- one instance where the 6-monthly report incorrectly recorded the date of a variation application and the day it was granted
- one instance where the 6-monthly report incorrectly recorded the period of effect of a variation extension
- one instance where the General Register, and subsequently the 6-monthly report, incorrectly recorded the expiry date of an urgent application.

4.53. The AFP advised it would issue addendums to rectify these errors.

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

APPENDIX A: INSPECTION CRITERIA AND METHODOLOGY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.2. Does the agency keep an accurate General Register?

2.2. Were reports properly made?

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

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

2.3. Was the agency cooperative and frank?

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