



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

For the period 1 July 2015 to 30 June 2016

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

AUSTRALIAN CRIME COMMISSION

AUSTRALIAN FEDERAL POLICE

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

April 2017

COMMONWEALTH
OMBUDSMAN



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INTRODUCTION

Part IAB of the *Crimes Act 1914* (Part IAB) enables certain law enforcement agencies to conduct controlled operations. Controlled operations can be broadly described as 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 also imposes a number of reporting obligations on agencies.

What we do

The Commonwealth Ombudsman (the Ombudsman) performs the monitoring mechanism under Part IAB and must, at least once every 12 months, inspect 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 Justice (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 2015 and 30 June 2016.

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 oversee

The Ombudsman is required to oversee the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC)¹ and the Australian Federal Police (AFP). The Ombudsman must also inspect the ACC's records to determine the extent of its compliance with corresponding state controlled operations legislation, if the ACC has used them.

Why we oversee agencies

Part IAB grants law enforcement agencies with extraordinary powers. It is part of the Ombudsman's role to provide assurance that agencies are approving and

¹ From 1 July 2016 the ACC and CrimTrac merged to form the Australian Criminal Intelligence Commission. However, as the ACC was still an entity at the time of our inspection, it will continue to be referred to as such for the purpose of this report.

conducting controlled operations as Parliament intended, and if not, hold the agencies accountable to the Minister and the public.

How we oversee agencies

We have developed a set of inspection methodologies that we apply consistently across all agencies. These methodologies are based on legislative requirements and best-practice standards in auditing, and ensure the integrity of each inspection. We focus our inspections on areas of high risk and take into consideration the impact of non-compliance.

We form our assessments based on the records made available at the inspection, discussions with relevant teams, processes we observe and information staff provide 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 in identifying sources of information to demonstrate compliance.

If necessary, the Ombudsman can rely on coercive powers to obtain any information relevant to an inspection and is to be given information despite any other laws.

We encourage agencies to be upfront and self-disclose any instances of non-compliance to our office and inform us of any remedial action the agency has taken. At the end of each inspection we provide our preliminary findings to the agency to enable the agency to take any immediate remedial action.

We may also assist agencies in ensuring compliance through 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

After an inspection, agencies are provided with detailed inspection reports. To ensure procedural fairness we provide a draft report on our findings to the agency for comment before it is finalised. The finalised reports are desensitised and form the basis of our reports to the Minister. Inspection results are considered finalised once the Ombudsman's internal report to the agency is completed, so typically there will be some delay between the date of inspection and the report to the Minister.

Included in this report is an overview of our compliance assessment of each agency, a discussion of each agency's progress in addressing any significant findings from previous inspections, details of any significant issues resulting from these inspections, and a comment on the adequacy of reports provided by agencies.

We may also discuss issues other than instances of non-compliance, such as the adequacies of an agency's policies and procedures to ensure compliance with Part IAB. Examples of what we may not include in this report are administrative issues or instances of non-compliance where the consequences are negligible.

This report presents the performance of each agency against our inspection criteria and discusses some exceptions to compliance (including where we were unable to determine compliance) for each agency. This report covers authorities that expired or were cancelled during the period 1 January to 31 December 2015. For security reasons, we do not inspect records relating to authorities which are still in force.

OVERVIEW OF INSPECTION FINDINGS

This report presents the performance of each agency against our inspection criteria and discusses some exceptions to compliance (including where we were unable to determine compliance), for each agency. The following tables provide an overview of our inspection findings for each six-month inspection period.

Authorities ceasing between 1 January and 30 June 2015

Agency	Australian Commission for Law Enforcement Integrity	Australian Crime Commission	Australian Federal Police
Number of authorities inspected	1 out of 1	9 out of 9	80 out of 80
Criteria	<i>Inspection findings</i>		
1. Did the agency obtain the proper authority to conduct the controlled operation?	Compliant with one self-disclosed administrative issue.	Compliant.	Compliant except in five instances, two of which were self-disclosed.
2. Were activities relating to a controlled operation covered by an authority?	Compliant.	Compliant except in one instance where we were unable to determine compliance.	Compliant except in five instances, three of which were self-disclosed, and a further two instances where we were unable to determine compliance.
3. Were all records kept in accordance with Part IAB?	Compliant.	Compliant except in two instances.	Compliant except in two instances, one of which was self-disclosed.
4. Were reports properly made?	Compliant.	Compliant except in eight instances, three of which were self-disclosed.	Compliant except in two instances.
5. Was the agency cooperative and frank?	ACLEI was open and assistive during the inspection. We commend the positive compliance culture promoted by ACLEI.	The ACC was open and assistive during the inspection. We commend the positive compliance culture promoted by the ACC.	The AFP was open and assistive during the inspection. We note the comparatively high number of authorities and the self-disclosure of most reported issues. We commend the positive compliance culture promoted by the AFP.

Authorities ceasing between 1 July and 31 December 2015

Agency	Australian Commission for Law Enforcement Integrity	Australian Crime Commission	Australian Federal Police
Number of authorities inspected	ACLEI advised that no authorities expired or were cancelled during the inspection period.	9 out of 9	93 out of 94
Criteria	<i>Inspection findings</i>		
1. Did the agency obtain the proper authority to conduct the controlled operation?	No inspection conducted.	Compliant.	Compliant except in six instances, three of which were self-disclosed.
2. Were activities relating to a controlled operation covered by an authority?	No inspection conducted.	Compliant.	Compliant except in eight instances, seven of which were self-disclosed.
3. Were all records kept in accordance with Part IAB?	No inspection conducted.	Compliant.	Compliant.
4. Were reports properly made?	No inspection conducted.	Compliant.	Compliant with administrative issues.
5. Was the agency cooperative and frank?	No inspection conducted.	The ACC continued to be cooperative and frank.	The AFP continued to be cooperative and frank. We note the comparatively high number of authorities and the self-disclosure of most reported issues.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

We conducted one inspection of ACLEI on 27 and 28 October 2015 for the period 1 January to 30 June 2015. No recommendations were made as a result of this inspection. No inspection was conducted for the period 1 July to 31 December 2015 as ACLEI advised no authorities to conduct controlled operations expired or were cancelled during this period.

We would like to acknowledge ACLEI's cooperation during the inspection and its ongoing frank and open engagement with our office.

Issues from previous inspections

We are satisfied that ACLEI has taken appropriate remedial action in relation to issues identified and self-disclosed at the previous inspections, and no further instances were identified.

Findings from 2015-16

No compliance issues were identified at the inspection. Although ACLEI self-disclosed an issue relating to an erroneous period of effect for one authority, based on the detailed and contemporaneously made records ACLEI presented at the inspection, we were satisfied that this was an administrative matter and did not represent a compliance issue.

We noted that ACLEI, at the time of the inspection, demonstrated sound administrative processes to ensure that it met the requirements of Part IAB. However, we identified that ACLEI's formalised policies did not capture all these processes. In response to this, ACLEI updated its policies to capture these administrative processes and mitigate the risk of non-compliance.

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 previous six months. This section also sets out the details which must be included in each report. 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 2015 and 1 July to 31 December 2015 to our office, and its 2014-15 annual report in accordance with Part IAB. We were satisfied that the required information was included in all reports.

AUSTRALIAN CRIME COMMISSION

We conducted our first inspection of the ACC on 15 and 16 December 2015 for the period 1 January to 30 June 2015 and conducted our second inspection on 19 and 20 April 2016 for the period 1 July to 31 December 2015. No recommendations were made as a result of either inspection.

We would like to acknowledge the ACC's cooperation during the inspections and its ongoing frank and open engagement with our office.

Issues from previous inspections

We are satisfied that the ACC has taken appropriate remedial action in relation to issues identified and self-disclosed at the previous inspections, and no further instances were identified.

Findings from 2015-16

No significant compliance issues were identified at either inspection. However at the December 2015 inspection, due to incomplete records we were unable to provide our usual level of assurance that activities engaged in during one controlled operation were covered by the authority. We note that there was nothing on file to indicate that the activities were not authorised. The ACC acknowledged this and advised that it had since included additional information on file.

Comprehensiveness and adequacy of reports

The ACC submitted its six-monthly reports under s 15HM for the periods 1 January to 30 June 2015 and 1 July to 31 December 2015 to our office, and similarly submitted its 2014-15 annual report, in accordance with Part IAB. We were satisfied that the required information was included in all reports, except in six instances in the 1 January to 30 June 2015 six-monthly report and two instances in the 2014-15 annual report. In each instance information was incorrectly recorded in, or omitted from, the reports. The ACC acknowledged these errors and advised that it would ensure its reports are adequately quality-checked. None of these issues were identified in the 1 July to 31 December 2015 six-monthly report, and we are satisfied that the ACC has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

AUSTRALIAN FEDERAL POLICE

We conducted our first inspection of the AFP from 19 to 22 October 2015 for the period 1 January to 30 June 2015 and conducted our second inspection from 11 to 15 April 2016 for the period 1 July to 31 December 2015. No recommendations were made as a result of either of these inspections, however we identified and the AFP self-disclosed a number of issues, the most significant of which are discussed below.

We would like to acknowledge the AFP's cooperation during the inspection and its ongoing frank and open engagement with our office.

Issues from previous inspections

Two significant issues that were raised in our last report to the Minister were again identified. The first issue was regarding participants and activities of controlled operations that were not covered by an authority. Despite the AFP launching a mandatory online training course for all sworn members and advising that it had provided targeted training to regional offices, a number of instances were identified during the 2015-16 inspections. However, most of these instances were self-disclosed by the AFP, and we note the AFP's ongoing efforts to address them.

The second issue was regarding instances where we were unable to determine whether civilian participants of a controlled operation were acting under the direction of law enforcement officers. However, we noted a significant improvement since our last report. Further information is provided below.

Findings from 2015-16

Finding 1 – Criterion 1

What Part IAB states

Section 15HC of Part IAB states that protection from criminal responsibility for conduct during a controlled operation and indemnification of participants against civil liability do not apply to a person's conduct that is, or could have been, authorised under Commonwealth law or a law of a State or Territory relating to electronic surveillance devices or telecommunications interception.

What we found

At the October 2015 inspection we identified that two internally granted authorities included activities that could have been authorised under the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*. Warrants authorising these activities are issued externally by a Judge or an

Administrative Appeals Tribunal Member under these Acts, once the agency has demonstrated that certain thresholds and conditions have been met.

Suggested practice

In order to mitigate future non-compliance we suggested additional legal consultation prior to the authorisation of a controlled operation so as to determine whether other Commonwealth laws should be relied on to authorise the required activities.

The AFP's response

The AFP has advised that it will obtain internal legal advice on a case-by-case basis prior to the authorisation of a controlled operation in order to mitigate reoccurrence of this issue.

Finding 2 – Criterion 2

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 would not apply and the participant would be open to criminal and civil liability for their actions.

Similarly, under s 15HA(2), a civilian participant of a controlled operation is protected from criminal liability if certain conditions are met. These conditions include being identified on the relevant authority and acting in accordance with instructions of a law enforcement officer. When agencies involve civilians in a controlled operation, we are of the view that it is important for that agency to take appropriate measures to provide protection for the civilian so that they are not unfairly subject to criminal and civil liability, and keep records to demonstrate this.

What we found and what the AFP self-disclosed

At the October 2015 inspection the AFP self-disclosed three instances where activities were undertaken without being covered by an authority and we identified a further two instances. We were also unable to determine compliance in two instances.

Instances self-disclosed by the AFP

- A civilian who was not listed on the authority as a participant and without the knowledge of the AFP engaged in activities relevant to the controlled operation. After the AFP became aware of this, the civilian continued to engage in these activities on two more occasions; however the AFP did not

vary the authority to include the civilian and activities, to provide the civilian with protection.

- A law enforcement officer engaged in activities that were not prescribed as conduct on the authority. We noted records which suggested that the AFP was aware that in this instance it should have sought an urgent variation to the relevant authority to include the activities.
- Controlled operation participants engaged in an activity that, although was similar to the prescribed controlled conduct, was not authorised.

Instances identified by our office

- A civilian who was not listed on the authority as a participant engaged in controlled conduct after being directed to do so by state law enforcement officers, who were participating in a joint taskforce with the AFP. We note in this instance that the state law enforcement officers acted against the advice of an AFP law enforcement officer.
- Prior to a controlled operation being authorised, a law enforcement officer directed a civilian to engage in related activities. We noted records which suggested that the AFP was aware that it should have sought an urgent authority in this instance to provide protection for the civilian.
- We were unable to determine if a civilian participant engaged in controlled conduct under the direction of a law enforcement officer.
- We were unable to determine if controlled conduct commenced prior to or after the relevant authority was granted, due to inconsistencies in the AFP's records.

At the April 2016 inspection the AFP self-disclosed seven instances where activities were undertaken without being covered by a valid authority and we identified one further instance.

Instances self-disclosed by the AFP

- In two instances, a civilian participant engaged in activities that were not prescribed as conduct on the authority.
- In two instances, a civilian participant engaged in activities before the relevant urgent controlled operation authority was granted.
- A law enforcement officer engaged in activities that were not prescribed as conduct on the authority.

- In two instances, a law enforcement officer engaged in controlled conduct when they were not listed as a participant on the authority. We note that, after one of these instances was identified, the AFP contacted the primary law enforcement officer responsible for the controlled operation and reinforced the importance of ensuring that only persons named on the authority engage in controlled conduct.

Instance identified by our office

- A civilian participant engaged in activities that were not prescribed as conduct on the authority.

What we suggested and the AFP's response

We suggested that the AFP provide additional and targeted training to the relevant staff. The AFP agreed to implement this suggestion and also advised that it will continue to address these issues with the measures outlined on page 8. We also note the AFP's immediate response to some of these issues as they arose and acknowledge the AFP's continuing efforts in this regard. Given that the majority of issues were self-disclosed and responded to, we have no concerns about the AFP's transparency and accountability. However, given the high level of risk associated with these instances of non-compliance, we will continue to monitor these issues closely.

Comprehensiveness and adequacy of reports

The AFP submitted its six-monthly reports under s 15HM for the periods 1 January to 30 June 2015 and 1 July to 31 December 2015 to our office, and its 2014-15 annual report, in accordance with Part IAB. We were satisfied that the required information was included in all reports, except in five instances in the 1 January to 30 June 2015 six-monthly report and in three instances in the 1 July to 31 December 2015 six-monthly report. In all instances information was incorrectly recorded in, or omitted from, the six-monthly reports. Despite these instances we are of the 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 operation 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 authorisations, 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 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?
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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 any 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 report 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?
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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 the Commonwealth Ombudsman and are they sufficient?	2.2.2 What are the agency's procedures for meetings its notification requirements and are they sufficient?
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2.3 Was the agency cooperative and frank?

