



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

FOR THE PERIOD 1 JULY 2018 TO 30 JUNE 2019

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

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

FOR THE PERIOD 1 JULY 2018 TO 30 JUNE 2019

Report by the Commonwealth Ombudsman
Michael Manthorpe PSM,
under s 15HO of the *Crimes Act 1914*

ISSN 1449-3314 - Print
ISSN 1449-3322 - Online

© Commonwealth of Australia 2020

The Commonwealth owns the copyright in all material produced by the Ombudsman.

With the exception of the Commonwealth Coat of Arms, the Office of the Commonwealth Ombudsman's logo, any material protected by a trade mark, and where otherwise noted, all material presented in this publication is provided under a Creative Commons Attribution 4.0 licence.

The details of the relevant licence conditions are available on the Creative Commons website (creativecommons.org/licenses/by/4.0/deed.en) as is the full legal code for the CC BY 4.0 licence.



The Commonwealth's preference is that you attribute this report and any material sourced from it using the following wording:

Source: Licensed from the Commonwealth Ombudsman under a Creative Commons 4.0 licence. This report is available from the Commonwealth Ombudsman website at www.ombudsman.gov.au.

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the It's an Honour website www.pmc.gov.au/government/its-honour

Contact us

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

Commonwealth Ombudsman
Level 5, 14 Childers Street
Canberra ACT 2600
Tel: 1300 362 072

Email: ombudsman@ombudsman.gov.au

CONTENTS

EXECUTIVE SUMMARY	1
PART 1: INTRODUCTION—SCOPE AND METHODOLOGY OF INSPECTIONS	3
Introduction.....	3
<i>What we do</i>	3
<i>Who we monitor</i>	3
<i>Why we oversee agencies</i>	4
<i>How we monitor agencies</i>	4
<i>Our criteria</i>	4
<i>How we report</i>	5
PART 2: AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY	6
Issues from previous inspections	6
Findings from 2018-19	6
<i>Comprehensiveness and adequacy of reports</i>	6
PART 3: AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION	8
Issues from previous inspections	8
Findings from 2018-19	9
<i>Finding 1—Approved conduct not reflected in written record</i>	9
<i>Finding 2—New authorities granted rather than variations to existing authority</i>	10
<i>Finding 3—Unauthorised participants and activities of controlled operations</i>	12
<i>Finding 4—General register and record keeping matters</i>	15
<i>Finding 5—Application requiring further information</i>	16
<i>Comprehensiveness and adequacy of reports</i>	17

PART 4: AUSTRALIAN FEDERAL POLICE	18
Issues from previous inspections	18
Findings from 2018-19	19
<i>Finding 1—Whether a controlled operation met the requirements of a major controlled operation</i>	<i>19</i>
<i>Finding 2—New authorisations issued rather than variations to existing authority.....</i>	<i>21</i>
<i>Finding 3—Unauthorised participants and activities of controlled operations</i>	<i>23</i>
<i>Finding 4—Written record of urgent authority must be issued</i>	<i>25</i>
Comprehensiveness and adequacy of reports	26
APPENDIX A – INSPECTION CRITERIA AND METHODOLOGY	28

EXECUTIVE SUMMARY

This report presents the results of the Office of the Commonwealth Ombudsman's (the Office) inspections of the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP) under Part IAB of the *Crimes Act 1914* (Part IAB), between 1 July 2018 and 30 June 2019.

Part IAB provides a framework for law enforcement agencies to conduct covert operations, known as controlled operations, for the purpose of investigating certain serious offences. As authorising agencies under Part IAB, ACLEI, the ACIC and the AFP may grant an authority to authorise a controlled operation. Participants who are involved in these operations are protected from criminal responsibility and indemnified against civil liabilities that may arise as a result of activities undertaken during the course of the operation, providing 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. At each inspection, we assess whether an agency's use of controlled operations during the relevant period was compliant with Part IAB and it has processes in place to support compliance. We consider an agency's transparency and accountability, and encourage staff to disclose issues to our Office as they arise. Where we or an agency identify issues, we focus on the actions taken by the agency to address them. We also check the agency's progress in addressing issues identified at previous inspections.

For 2018-19, we inspected a sample of the authorities that the ACIC and the AFP advised us had expired or were cancelled between 1 January and 31 December 2018. In our previous annual report, we noted instances in which conduct and/or participants were included in controlled operations activities when they were not authorised. We considered that these instances of non-compliance presented a high level of risk and, as such, focused heavily on this issue at inspections during the reporting period. At both the ACIC and the AFP, we again identified instances where participants or activities of controlled operations were not authorised and, as such, not indemnified from criminal or civil liability under Part IAB.

In our previous annual report, we noted instances where new authorities were granted in circumstances when operations should have proceeded as variations or extensions to a principal controlled operation authority. We

acknowledge that Part IAB does not prevent consecutive authorities and seeking them does not represent non-compliance, but in our view, a variation or extension should be sought where it can be, in order to enliven the Administrative Appeals Tribunal (AAT) oversight mechanism.

We consider that having multiple controlled operation authorities in effect for one operation presents risks, including to:

- agencies' record-keeping obligations
- the potential for unauthorised conduct where simultaneous authorities with overlapping scopes are in effect and it is not clear which authority authorises participants to engage in particular conduct
- circumventing (even inadvertently) the AAT oversight mechanism, making it possible to have controlled operations in place for longer than three months without independent oversight, contrary to the intention of the legislation.

For ACLEI, we inspected all authorities it advised us had expired or were cancelled between 1 January and 31 December 2018. We did not identify any significant non-compliance issues.

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 course of the operation, provided that certain conditions under Part IAB are met.

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

What we do

1.4. The Ombudsman performs the independent oversight mechanism provided under Part IAB. The Office must, at least once every 12 months inspect authorising agencies' records to determine the extent to which the agency and its officers have complied with Part IAB. The Ombudsman must report to the Minister for Home Affairs (the Minister) as soon as practicable after 30 June each year, on inspections conducted during the preceding 12 months. This report sets out the results of the Ombudsman's inspections conducted between 1 July 2018 and 30 June 2019.

1.5. In this report, the Ombudsman must also include comments on the comprehensiveness and adequacy of the reports provided by agencies to the Minister and the Ombudsman under ss 15HM and 15HN of Part IAB.

Who we monitor

1.6. The Ombudsman is required to monitor the activities of ACLEI, the ACIC and the AFP. The Ombudsman must also inspect the ACIC's records to determine the extent of its compliance with corresponding State and Territory controlled operations legislation, if the ACIC has exercised those powers during the relevant period.

Why we oversee agencies

1.7. Part IAB grants law enforcement agencies extraordinary powers. The Ombudsman's oversight role is important in ensuring that agencies approve and conduct controlled operations in accordance with Part IAB and are held to account 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 monitor agencies

1.8. The Office has developed a set of inspection methodologies and criteria that we apply consistently across all agencies. These methodologies are based on legislative requirements and best practice standards.

1.9. We focus our inspections on areas of high risk, taking into consideration the impact of non-compliance.

1.10. We assess compliance based on the records made available at the inspection, discussions with relevant agency staff, observations of agencies' processes through information they provide and agencies' remedial action in response to any identified issues.

1.11. To ensure that agencies are aware of what we will be assessing, we provide them with a broad outline of our criteria prior to each inspection. This assists agencies to identify and present the best sources of information to demonstrate compliance.

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

1.13. We may assist agencies to maximise compliance by assessing agencies' policies and procedures, communicating 'best practice' in compliance and engaging with agencies between inspections.

Our criteria

1.14. The objective of our inspections is to determine the extent of compliance with Part IAB by an agency and its law enforcement officers.

We use the following criteria and consider the following questions to assess compliance:

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

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

How we report

1.16. To ensure procedural fairness, we give agencies the opportunity to comment on our findings. The findings from these reports are de-sensitised and form the basis of the Ombudsman's report to the Minister.

1.17. This report provides an overview of our compliance assessment of each agency for the reporting period, discusses each agency's progress in addressing any significant findings from previous inspections, details any significant issues resulting from these inspections, and includes comments on the adequacy of reports provided by agencies.

1.18. We may also report on issues other than instances of non-compliance, such as the adequacy of an agency's policies and procedures to ensure compliance with Part IAB. We may not report on administrative issues or instances of non-compliance where the consequences are negligible.

Part 2: AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

2.1. During 2018-19 we conducted one inspection at ACLEI from 13 to 14 May 2019. We inspected the records relating to the two controlled operations authorities that expired or were cancelled between 1 January and 31 December 2018.

Issues from previous inspections

2.2. We did not identify any compliance issues at our inspections in 2017-18. However, we did identify two instances which affected the comprehensiveness and adequacy of reports, where information in the six-monthly report for the 1 July to 31 December 2017 period contained incorrect information. ACLEI subsequently provided an amended report to the Minister and our Office for that period.

Findings from 2018-19

2.3. We did not identify any compliance issues at our inspection in 2018-19.

Comprehensiveness and adequacy of reports

2.4. Section 15HM of Part IAB requires each agency to report to the Ombudsman and the Minister twice each year, as soon as practicable after 30 June and 31 December, on the details of its controlled operations during the preceding six months. This section also sets out the details that must be included in the report.

2.5. Under s 15HN of Part IAB, 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) of Part IAB in relation to controlled operations it authorised during the previous 12 months.

2.6. ACLEI submitted its six-monthly reports under s 15HM of Part IAB for the periods 1 January to 30 June 2018 and 1 July to 31 December 2018 to our Office and its 2018-19 annual report, in accordance with Part IAB. We were satisfied that the required information was included in all reports, except in two instances in the 1 January to 30 June 2018 six monthly report where information was recorded incorrectly. ACLEI

provided the Office with information to clarify the administrative errors and confirmed that the inaccurate data had been corrected in the subsequent six-monthly report and was correct in the annual report for 2018-19. As such, ACLEI has advised our Office that it did not consider it necessary to provide an amended report for the period 1 January to 30 June 2018 to the Minister and our Office.

Part 3: AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

3.1. During 2018-19 we conducted one inspection at the ACIC from 20 to 24 May 2019. We assessed 38 of the 89 controlled operations authorities that expired or were cancelled between 1 January and 31 December 2018. The ACIC advised that it did not use any corresponding State and Territory controlled operations legislation during 2018-19.

3.2. For this inspection, we assessed authorities that presented the highest risk rather than inspecting all authorities that expired or were cancelled in the period. We consider higher risk authorities are those that relate to complex and long-running controlled operations, such as those that had been varied or extended multiple times or that involve a large number of participants.

Issues from previous inspections

3.3. During our 2017-18 inspections we identified several issues relating to whether activities that participants engaged in during a controlled operation were authorised. We identified similar issues at our 2018-19 inspection.

3.4. During 2017-18, we also identified one instance where the ACIC had granted consecutive authorities rather than seeking an extension to the existing authority. We identified a similar issue at our 2018-19 inspection where authorities were not being varied in accordance with Part IAB and instead, consecutive authorities were being granted.

3.5. During 2017-18 we identified a number of issues related to the general register and other record-keeping matters. While similar issues arose in the 2018-19 inspection, we note the numbers were much lower than the previous year and the ACIC had taken appropriate remedial action regarding the issues previously identified.

Findings from 2018-19

Finding 1—Approved conduct not reflected in written record

What Part IAB provides

3.6. Section 15GK(2) of Part IAB provides a list of information that must be included in an urgent (verbal) authority, which includes specifying the nature of the conduct that law enforcement participants may engage in as well as the particular controlled conduct that any civilian participant may engage in.

What we found

3.7. During the inspection we identified a written record for an urgent authority which did not accurately reflect the controlled conduct approved for the participants.

3.8. In this instance there appeared to be a difference between the application and controlled operation authority in terms of how the controlled conduct was recorded.

3.9. The written record of the authority did not state that law enforcement participants were authorised to instruct the covert operatives and, instead, included them under the same list of authorised conduct.

3.10. During the inspection the ACIC advised our Office that the covert operative had acted under instructions at all times and that this had been the intent of the application. As this was not captured in the written record of authority, the authority did not accurately reflect the approved conduct.

The ACIC's response

3.11. The ACIC acknowledged this finding without further comment.

Finding 2—New authorities granted rather than variations to existing authority

What Part IAB provides

3.12. Sections 15GO and 15GU of Part IAB provide the requirements to vary an existing authority for a controlled operation. Under s 15GO(2) of Part IAB, a variation may:

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

3.13. Section 15GO(5) of Part IAB states that an authority must not be varied unless an authorising officer is satisfied, on reasonable grounds, that the variation will not authorise a significant alteration of the nature of the controlled operation, including an alteration that would change the nature of the criminal offences to which the controlled operation relates.¹

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

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

What we found

3.15. During our inspection, we identified two instances where new authorities were granted for a similar controlled operation, when it was possible for the original authority to have been varied. As a result, these related controlled operations ran for combined periods of longer than three months, thereby circumventing the need for AAT oversight.

3.16. At our inspection the ACIC advised us of an operational practice which divides operations into phases, and uses separate authorities for each defined phase.

3.17. In the first instance we identified two authorities which overlapped for a period of two months and targeted largely the same persons of interest and conduct, with the only change to the second authority being the removal of one offence.

3.18. In the second instance two authorities overlapped for a period of one week and were then cancelled, and a third authority was granted. We identified that each authority targeted the same offences and the nature of the investigation was the same, although the person of interest was altered. While the third authority in this sequence was issued subsequent to the first two authorities being cancelled, we identified evidence that the third authority was contemplated prior to that cancellation.

The ACIC's response

3.19. The ACIC advised that it has since provided further guidance to both investigators and lawyers regarding the best practice approach to extend existing authorities rather than seek a new authority in respect of the same criminal activity.

3.20. The ACIC noted that this advice included an emphasis on the need to document the decision rationale when a new authority was sought in preference to a variation, and the need to consider whether any new authority should be subject to a condition taking into account any previous operation.

Finding 3—Unauthorised participants and activities of controlled operations

What Part IAB provides

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

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

3.23. Section 15GO of Part IAB enables an authority to be varied to authorise participants to engage in additional or alternative controlled conduct.

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

3.25. Under s 15HE of Part IAB, if a person engages in ancillary conduct and at the time they engaged in the ancillary conduct they believed related controlled conduct was being or would be engaged in, then the person is not criminally responsible for that ancillary offence. An ancillary offence includes conspiring to commit the offence constituted by the controlled operation, or aiding, abetting, counselling or procuring, inciting or being in any way knowingly concerned in committing the offence constituted by the related controlled conduct.

What we found

3.26. The ACIC disclosed three circumstances where activities relating to a controlled operation were not authorised and therefore not indemnified under ss 15HA and 15HB of Part IAB.

3.27. During the inspection we identified a further:

- two instances where, based on available information, law enforcement officers engaged in controlled conduct prior to an authorisation commencing
- two instances where, due to a lack of detailed evidence, we were unable to assess whether conduct engaged in constituted controlled conduct
- three instances where we were unable to determine if a civilian participant was acting under lawful instruction.

Unauthorised conduct

3.28. The ACIC disclosed an instance where a civilian participant acted on the direction of a covert operative who was not authorised to provide instructions to them. While the covert operative's activity could be considered ancillary and exempted under s 15HE of Part IAB, the civilian participant's conduct constitutes an offence as it was not performed at the direction of a law enforcement officer authorised to provide instructions.

3.29. The ACIC disclosed a further instance where a law enforcement officer who was not authorised to engage in controlled conduct corresponded with the target of a controlled operation. We note that the ASIC took internal action to address the issue and it was also reported to our Office and the Minister.

3.30. The ACIC also disclosed an instance where it identified that controlled conduct took place after one authority expired and prior to a new authority commencing.

3.31. Our inspection identified one instance where a law enforcement officer engaged in conduct as a covert operative without authorisation. A variation was subsequently granted which added that officer as a covert operative authorised to engage in conduct.

3.32. Our inspection also identified one controlled operation where the conduct log indicated controlled conduct had occurred prior to the authority commencing. Although the ACIC's records lent themselves to a possible interpretation that the conduct did not constitute controlled conduct, we consider the controlled conduct which commenced immediately after the authority was granted was only able to occur so promptly due to the activity that took place prior to the authority. We consider the conduct before the authority was granted laid critical groundwork for the operation and so involved conduct that was criminal in

nature and therefore constituted controlled conduct. We referred this matter to the ACIC for further consideration.

Unable to assess whether conduct was controlled conduct

3.33. At our inspection we identified an instance where a covert operative was contacted by phone before the relevant authority was granted. While internal correspondence reflected the view that the phone call did not constitute controlled conduct, a lack of contemporaneous records detailing the discussions meant we were unable to satisfy ourselves that the phone calls did not constitute controlled conduct without authorisation.

3.34. We also identified a file which contained a discrepancy in the date the controlled conduct commenced, when comparing the conduct log and the six-monthly report. Specifically, the conduct log recorded contact between human sources and a target on instruction from law enforcement officers but, due to a lack of detail, we were unable to determine if these actions constituted controlled conduct.

Lawful instruction of civilian participants

3.35. We identified one file where we could not confirm on the available records if the actions undertaken by the civilian participant were in accordance with law enforcement participant instructions. The authority for this controlled operation also did not specify that the civilian participant would act at the direction or instruction of law enforcement participants.

3.36. We identified another authority which did not specify the civilian participants' conduct would be under the direction of a law enforcement participant.

3.37. Similarly, one variation authority inspected by our Office provided a specific list of authorised conduct for law enforcement participants, but did not authorise them to instruct civilian participants in such conduct.

3.38. In the absence of information to confirm civilian participants' unlawful activities were undertaken at the direction of a law enforcement officer, we are unable to determine whether the civilian participants' conduct is indemnified from criminal or civil liability under ss 15HA and 15HB of Part IAB.

The ACIC's response

3.39. The ACIC noted that, due to the nature of controlled conduct, it is unable to quarantine information but advised that, where appropriate, any information identified as having been obtained without appropriate authority will be restricted from further use and communication.

3.40. The ACIC advised that it has subsequently made many changes to its procedures and guidance material regarding the use, coordination, limitations and reporting requirements associated with controlled operation authorities, to account for the risk associated with persons engaging in conduct without an authority in force.

3.41. The ACIC has also completed a review of its templates and disseminated a new template in July 2019 to accommodate commentary from our Office. This template prompts applicants to detail the proposed controlled conduct a civilian participant may engage in, ensuring that it is clear and can only be undertaken under lawful instruction.

3.42. The ACIC also noted that it is not its practice to rely on s 15HE of Part IAB to protect persons from criminal responsibility, but it instead uses it to ensure law enforcement officers involved in overseeing or authorising a controlled operation are not criminally responsible for 'ancillary conduct' they believe is related to controlled conduct.

Finding 4—General register and record keeping matters

What Part IAB provides

3.43. Under s 15HQ of Part IAB, an agency must keep a general register, specifying certain details about each controlled operation. For example, under s 15HQ(2)(b)(x) of Part IAB the general register must include both the date and time the controlled operation began, as well as when it ceased, and the outcome of the operation.

What we found

3.44. We identified two circumstances where we were unable to determine the accuracy of the ACIC general register as there were inconsistencies between the information recorded about controlled conduct in the conduct log when compared to that recorded in the general register.

3.45. In the first instance, the general register stated a specific time that controlled conduct ceased in a controlled operation, but the conduct log for the same operation recorded that conduct took place until approximately two and a half hours later.

3.46. In the second instance, the general register recorded communications between a covert operative and target as being of an 'introductory nature only', while the conduct log did not reference any communications of an 'introductory nature only'.

The ACIC's response

3.47. The ACIC advised that it has made improvements to its quality assurance processes, along with changes to its template to better assist with accurate record keeping.

Finding 5—Application requiring further information

What Part IAB provides

3.48. Under s 15GH(4)(b) of Part IAB, an application for a controlled conduct authority must state whether the proposed controlled operation, or any other controlled operation with respect to the same criminal activity, has been the subject of an earlier application for an authority or variation of an authority and, if so, whether or not the authority was given or the variation granted.

What we found

3.49. During our May 2019 inspection we identified an application for a controlled operation which did not include the details of all relevant previous controlled operations authorities for the same criminal activity.

3.50. In this instance, the application stated only one earlier related controlled operation had been authorised, but the third variation application to the Administrative Appeals Tribunal (AAT) identified there had been another authority given prior to the one identified in the application.

3.51. We also viewed the ACIC's detailed register which tracks all authorities issued to the agency, and consider this is an effective mechanism to ensure applications include all information required by

s 15GH(4)(b) of Part IAB. In turn, we consider this incident was an isolated administrative error.

The ACIC's response

3.52. The ACIC acknowledged this finding without further comment.

Comprehensiveness and adequacy of reports

3.53. Section 15HM of Part IAB requires each agency to report to the Ombudsman and the Minister twice each year, as soon as practicable after 30 June and 31 December, on the details of its controlled operations during the preceding six months. This section also sets out the details the report must include.

3.54. Under s 15HN of Part IAB, 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.

3.55. The ACIC submitted its six monthly reports under s 15HM of Part IAB for the periods from 1 January to 30 June 2018 and from 1 July to 31 December 2018 to our Office, and its 2017-18 annual report, in accordance with Part IAB. We were satisfied that the required information was included in all reports, except for four instances in six monthly reports where information was incorrectly recorded.

3.56. Despite these instances, in our view the ACIC has adequate processes in place to achieve compliance with the reporting requirements of Part IAB.

The ACIC's response

3.57. The ACIC acknowledged these errors and advised it will provide updated reports to the Minister under s 15HM of Part IAB.

Part 4: AUSTRALIAN FEDERAL POLICE

4.1. During 2018-19 we conducted one inspection at the AFP from 6 to 10 May 2019. We assessed 44 of the 106 controlled operations authorities that expired or were cancelled between 1 January and 31 December 2018.

4.2. For this inspection, we assessed authorities that presented the highest risk rather than inspecting all authorities that expired or were cancelled in the period. In our view higher risk authorities are those that relate to complex and long-running controlled operations, such as those that had been varied or extended multiple times or that involve a large number of participants.

Issues from previous inspections

4.3. During 2017-18, we identified eight instances where the AFP did not vary authorities in circumstances provided for under Part IAB. In those instances, the AFP applied for new authorities when we consider the original authorities could have been varied and therefore facilitated greater independent oversight by the AAT. We identified this issue again at our 2018-19 inspection.

4.4. During 2017-18 we noted several instances where participants and/or activities of controlled operations were not authorised. Although the AFP has made ongoing efforts to remediate the occurrence of these issues, we continue to see this issue during our inspections. In 2018-19 we identified instances of participants or activities of controlled operations not being authorised, but acknowledge the number of instances has decreased from previous years. We consider these to be isolated errors rather than representing an ongoing systemic issue.

Findings from 2018-19

Finding 1—Whether a controlled operation met the requirements of a major controlled operation

What Part IAB provides

4.5. Section 15GD of Part IAB defines controlled operations and major controlled operations.

4.6. Under s 15GD(1) of Part IAB, a controlled operation is an operation that:

- involves the participation of law enforcement officers; and
- is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect; and
- may involve a law enforcement officer or other person in conduct that would, apart from section 15HA, constitute a Commonwealth offence or an offence against a law of a State or Territory.

4.7. Under section 15GD(2) of Part IAB, a major controlled operation is a controlled operation that is likely to:

- involve the infiltration of an organised criminal group by one or more undercover law enforcement officers for a period of more than 7 days; or
- continue for more than 3 months; or
- be directed against suspected criminal activity that includes a threat to human life.

4.8. Section 15GF of Part IAB defines ‘authorising officer’ in the context of a major controlled operation and a controlled operation. While any AFP authorising officer under s 15GF(2) of Part IAB can authorise a controlled operation, the authorising officer for a major controlled operation is the Commissioner or Deputy Commissioner of the AFP.

What we found

4.9. During our inspection, we identified two instances where controlled operations were authorised by an authorising officer under s 15GF(2)(c) of Part IAB when the operation appeared to meet the definition of a 'major controlled operation' and therefore required authorisation by the Commissioner or Deputy Commissioner.

4.10. In the first instance, a controlled operation was extended multiple times up to the 24 month maximum allowed by Part IAB. The first application for a variation extending the operation highlighted the expectation that the operation would be conducted over a protracted period of time.

4.11. During the inspection, the AFP advised our Office that it had considered making an application for a 'major controlled operation' and sought internal advice regarding the classification of the operation under s 15GD of Part IAB. However, records of this consideration and advice were not on file for us to review.

4.12. In the second instance, undercover officers were involved and the authority was granted for a three month period. Given that the operation's conduct related to an organised criminal group, our Office was concerned that this operation met the requirements to be classified as a 'major controlled operation'. We also noted that, despite being granted for a three month period, the authority was cancelled and a new authority for a 'major controlled operation' was issued.

4.13. The AFP advised at the inspection that the conduct authorised under the initial authority was not envisaged to continue for longer than seven days.

The AFP's response

4.14. The AFP acknowledged this finding and advised it supports the record-keeping measures suggested. It will communicate with relevant areas about the need to retain on file all advice and relevant documentation related to decisions about controlled operation authorities.

Finding 2—New authorisations issued rather than variations to existing authority

What Part IAB provides

4.15. Under section 15GH(4)(b) of Part IAB, an application must state whether the proposed controlled operation, or any other controlled operation with respect to the same criminal activity, has been the subject of an earlier application for an authority or variation of an authority and, if so, whether or not the authority was given or the variation granted.

4.16. Section 15GJ of Part IAB outlines the manner for granting authorities to conduct controlled operations and also details that authorities can be issued in respect of a controlled operation that has been the subject of a previous authority, but a subsequent authority must be a formal (written) authority.

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

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

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

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

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

4.20. Section 15GQ(1A) of Part IAB provides for variations where that variation would have the effect of changing a controlled operation to a major controlled operation and states that those applications must be referred to the Commissioner or Deputy Commissioner.

What we found

4.21. During our May 2019 inspection we identified three authorities which were closely related. In our view, two of those authorities should have proceeded as variations to the principal controlled operation authority. For one of the three related authorities, the AFP also disclosed an instance of an urgent (verbal) authority application that did not identify a previous relevant authority.

4.22. For the instance disclosed by the AFP, we consider that this application not only did not comply with s 15GH(4)(b) of Part IAB in not identifying a prior authority, but also did not comply with s 15GJ(2) of Part IAB because the AFP did not obtain a formal (written) authority even though one was required due to that controlled operation already having been subject to an authority.

4.23. Another of the three related authorities involved an initial authority that was issued for three months and cancelled one month later so that a new 'major controlled operation' authority could be issued. While the conduct and participants were altered between authorities, both authorities consistently targeted the same persons of interest and offences with a cumulative duration of four months. A further urgent authority was then granted while the major controlled operation authority remained in effect.

4.24. The fact that the AFP sought internal advice when it applied for the urgent authority above demonstrates that the AFP considered variation provisions. However, the advice concluded that a variation could not be

sought because the alterations required were considered to be significant. However, in our view the AFP should have proceeded with a variation rather than a new authority because the offences and persons of interest were largely consistent and directed towards the same primary criminal activity with the only alteration being the specific offences targeted.

The AFP's response

4.25. When speaking to us about the instance it had disclosed, the AFP advised it considered that a variation could have been sought, but that internal advice confirmed a new controlled operation was also appropriate. The AFP acknowledged the application should have explicitly referenced the authority that was previously granted, but said it considered the implicit reference to a previous application was sufficient to meet its obligations under s 15GJ(2) of Part IAB.

4.26. The AFP disagreed with our assessment and confirmed its position that, as the offences differed, it considered the criminal nature of the controlled operation was significantly altered and a variation was not appropriate.

4.27. The AFP also did not accept our finding that the urgent verbal authority it had granted did not comply with Part IAB. The AFP advised that it considered the nature of the controlled operation was significantly altered from the previous authority and, therefore, the previous major controlled operation was not a notifiable previous application under s 15GJ(2) of Part IAB.

4.28. The AFP confirmed it would continue to seek internal advice where it considers potential links between authorities and will keep all advice on file to support decision making processes.

Finding 3—Unauthorised participants and activities of controlled operations

What Part IAB provides

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

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

4.31. Section 15HC of Part IAB provides that the protections provided in ss 15HA and 15HB of Part IAB do not apply where a person's conduct is, or could have been authorised under Commonwealth or State or Territory laws relating to aspects of criminal investigations.

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

4.33. Section 15GO of Part IAB enables an authority to be varied to authorise participants to engage in additional or alternative controlled conduct.

4.34. Under s 15GP(3)(b) of Part IAB, in particular circumstances an urgent variation application may be made orally in person or by telephone.

What we found

4.35. The AFP disclosed one instance, and our inspection identified a further two instances, where activities related to a controlled operation were not appropriately authorised and therefore not indemnified under ss 15HA and 15HB of Part IAB.

4.36. In the circumstances disclosed by the AFP, a civilian participant authorised to engage in controlled conduct under an authority delegated their conduct to an employee who was not an authorised participant, contrary to the instruction of the AFP officers involved. A variation to the authority was subsequently granted to add that civilian.

4.37. Our inspection identified a further instance where the conduct engaged in was contrary to the authority, due to typographical errors on the authority regarding the conduct that was authorised. We raised this issue with the AFP during the inspection and it referred the issue for internal review. We consider this action was appropriate.

4.38. We identified one controlled operation authority which was issued despite advice on the file which identified risks in granting that authority because other covert and intrusive powers were available.

The AFP's response

4.39. The AFP acknowledged this finding and advised it continues to strive for compliance and best practice.

4.40. The AFP also confirmed it had sought advice regarding the authority that contained typographical errors. The advice received reflected the error was an "immaterial defect" and did not affect the validity of the authority. Nonetheless, the AFP confirmed it will continue to check all controlled operation applications and authorities to prevent this kind of error in the future.

Finding 4—Written record of urgent authority must be issued

What Part IAB provides

4.41. Under s 15GR(2) of Part IAB an authorising officer, on having approved a variation of authority, must prepare and give, as soon as practicable, to the applicant or principal law enforcement officer a written document that complies with s 15GS of Part IAB.

What we found

4.42. The AFP disclosed one instance in which the formal record of an urgent (verbal) variation was provided approximately one month after it was authorised.

4.43. The AFP advised that this delay was contrary to AFP standard practice requiring the written record within 7 days, and occurred due to an oversight by the principal law enforcement officer.

4.44. While there is no definition of 'as soon as practicable' in Part IAB, a delay of more than seven days in providing a written record of a variation under s 15GR(2) of Part IAB presents risks regarding the potential for additional conduct or participants being authorised and engagement in criminal conduct occurring without written record of the authorisation and associated indemnification. As such, we consider seven days to be a maximum limit regarding the legislative requirement that a record be

provided 'as soon as practicable' and have considered agency's internal policies in taking this approach.

The AFP's response

4.45. The AFP acknowledged this finding and confirmed its ongoing commitment to meeting best practice standards at all times.

Comprehensiveness and adequacy of reports

4.46. Section 15HM of Part IAB requires each agency to report to the Ombudsman and the Minister twice each year, as soon as practicable after 30 June and 31 December, on the details of its controlled operations during the preceding six months. This section also sets out the details the report must include.

4.47. Section 15HM(2)(q)(iii) of Part IAB requires that the six monthly report includes information about the foreign countries through which illicit goods passed during the course of an operation.

4.48. Under s 15HN of Part IAB, as soon as practicable after 30 June of 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) of Part IAB in relation to the controlled operations it authorised during the previous 12 months.

4.49. The AFP submitted its six monthly reports under s 15HM of Part IAB for the periods 1 January to 30 June 2018 and 1 July to 31 December 2018 to our Office, and its 2017-18 annual report, in accordance with Part IAB. In one instance both the six monthly and the annual report incorrectly identified the outcome of an operation, stating the authorised conduct amounted to 'attempted engagement' while the Final Effectiveness Report recorded effective engagement in the authorised conduct. We also identified a further two instances in the six monthly report of errors in identifying which countries illicit goods had passed through.

4.50. The AFP has since advised that, in the instance where we identified an error in the six monthly and annual reports about the conduct authorised, it has received confirmation the conduct reported was undertaken outside of Australia and therefore not engaged in, or reportable, under that controlled operation authority.

4.51. The AFP also advised that it has clarified the two instances of errors in six monthly reports detailing which countries illicit goods had passed through. The AFP advised that the Final Effectiveness Reports used to cross-check the statutory reports contained errors and the reports to the Minister were, in fact, correct.

4.52. Despite this small number of instances, 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* 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 AAT member and are they sufficient?	1.1.3 What are the agency's procedures to ensure that ongoing controlled operations are subject to a nominated AAT member's oversight and are they sufficient?	1.1.4 What are the agency's procedures for cancelling authorities and are they sufficient?
---	--	--	--

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? Are records accurate and comprehensive?	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?

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