



**CORRUPTION  
AND CRIME  
COMMISSION**

**CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

**ANNUAL COMPLIANCE REPORT INTO THE  
*CRIMINAL INVESTIGATION (COVERT POWERS)  
ACT 2012***

**REPORT FOR THE MINISTER FOR FISHERIES**

**November 2013**



## ABBREVIATIONS AND ACRONYMS

("the CCC Act")	<i>Corruption and Crime Commission Act 2003</i>
("the Commission")	Corruption and Crime Commission
("the Act")	<i>Criminal Investigation (Covert Powers) Act 2012</i>
WAPOL	Western Australia Police
DOF	Department of Fisheries
ACC	Australian Crime Commission



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## INTRODUCTION

- [1] The *Criminal Investigation (Covert Powers) Act 2012* ("the Act") was assented on 3 December 2012 and proclaimed on 1 March 2013. The purpose of the Act is to provide law enforcement agencies with the power to conduct covert operations to investigate and combat a wide range of crimes.
- [2] The Commission's role is to inspect the records of a law enforcement agency to determine the extent of compliance with Part 2 of the Act. The Commission may also comment on the comprehensiveness and adequacy of reports provided by law enforcement agencies on controlled operations conducted under Part 2 of the Act.
- [3] Between 1 March and 30 June 2013, the Department of Fisheries (DOF) did not apply for any controlled operations. Despite this, the Commission inspected two proposed application documents and the relating provisional template documentation with reference to the consideration, approval and authority to ensure it would comply with the Act.
- [4] The Commission's inspection found that the DOF had complied with the requirements of the Act and the records kept in relation to controlled operations under the Act were comprehensive and adequate.
- [5] This report provides details of activities carried out by DOF, with regards to controlled operations during the reporting period 1 March 2013 to 30 June 2013.





## CONTROLLED OPERATIONS

- [1] Controlled operations involve covert methods of investigation used by applicable law enforcement agencies. These methods of investigation may involve participants obtaining authority to carry out actions which would normally constitute a criminal offence when it is deemed necessary in order to disrupt and deter serious and organised crime.
- [2] Serious and organised crime groups often run a sophisticated criminal network overseen by a hierarchical structure. Due to their awareness of law enforcement tactics, they cannot be easily penetrated and thus specialist methods of infiltration and surveillance may be required.
- [3] It is often necessary to use covert investigation techniques to infiltrate these criminal enterprises to gather evidence to arrest and prosecute offenders.
- [4] The Act enables persons from applicable law enforcement agencies to be exempt from criminal and civil liability associated with controlled operations. Exemption is only granted when an officer's actions are in line with an approved authority and on conditions within the Act being met.
- [5] Specific legislation which allows for immunity from certain illegal conduct has been enacted by a number of states, including Western Australia.
- [6] The central features of the regulatory framework for controlled operations include:
  - (a) requirements for submitting and considering an application for the authorisation of controlled operations;
  - (b) specific methods of application and delegation of the power to authorise controlled operations;
  - (c) a stipulated time period for a controlled operation to be completed, not exceeding 6 months;
  - (d) provision to allow officers to undertake controlled operations at short notice with retrospective authorisation;
  - (e) the provision of criminal immunity and civil indemnity to participating law enforcement officers and other authorised persons; and
  - (f) provisions to provide a structured compliance function for the application agency and the Commission.<sup>1</sup>

### Key Provisions of the Legislation

- [7] The Act enables the Chief Executive Officer or delegate of a prescribed law enforcement agency to authorise the conduct of a "controlled operation" for a "relevant offence". This includes:

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<sup>1</sup>*Criminal Investigation (Covert Powers) Act 2012*

*(a) An offence against the law of this jurisdiction punishable by imprisonment for 3 years or more; or*

*(b) An offence not covered by paragraph (a) that constitutes a "relevant offence" under any of the following Acts -*

*(i) The Classification (Publications, Films and Computer games) Enforcement Act 1996;*

*(ii) The Criminal Code;*

*(iii) Firearms Act 1973;*

*(iv) Fish Resources Management Act 1994;*

*(v) Misuse of Drugs Act 1981;*

*(vi) Prostitution Act 2000;*

*(vii) Weapons Act 1999.*

[8] An authority to conduct a controlled operation may be made in two ways. A formal application must be made in writing and signed by the applicant. An urgent application can be made in person, by telephone or other electronic means.

[9] In either circumstance, section 10 of the Act states that an application must contain sufficient information for a chief officer to make an informed decision prior to approving a controlled operation and must state whether the application is the subject of a variation to a previous application and whether that application was granted.

[10] Section 12 of the Act gives detailed guidance for the authorising officer, taking into account the following:

*(a) that a relevant offence has been, is being or is likely to be committed;*

*(b) that the authority falls under the duty of that law enforcement agency.*

*(c) that any unlawful conduct deemed necessary in carrying out a controlled operation will be minimised.*

*(d) that the operation will be conducted in a way that will minimise the risk of more illicit goods being in the possession of persons other than law enforcement officers.*

*(e) that the proposed controlled conduct will be able to be accounted for to meet the reporting requirements set out in Division 4 of the Act;*

*(f) that the operation does not involve any participant in the operation inducing or encouraging another person to engage in an unlawful Act other than what could be reasonably expected.*

- (g) that any conduct involved in the operation will not -
- (i) seriously endanger the health or safety of any person; or
  - (ii) cause the death of, or serious injury to, any person; or
  - (iii) involve the commission of a sexual offence against any person; or
  - (iv) result in unlawful loss of or serious damage to property (other than illicit goods).

[11] Point (f) above addresses the issue of entrapment. The Ombudsman of NSW describes this provision in their 2012 Annual Report as:

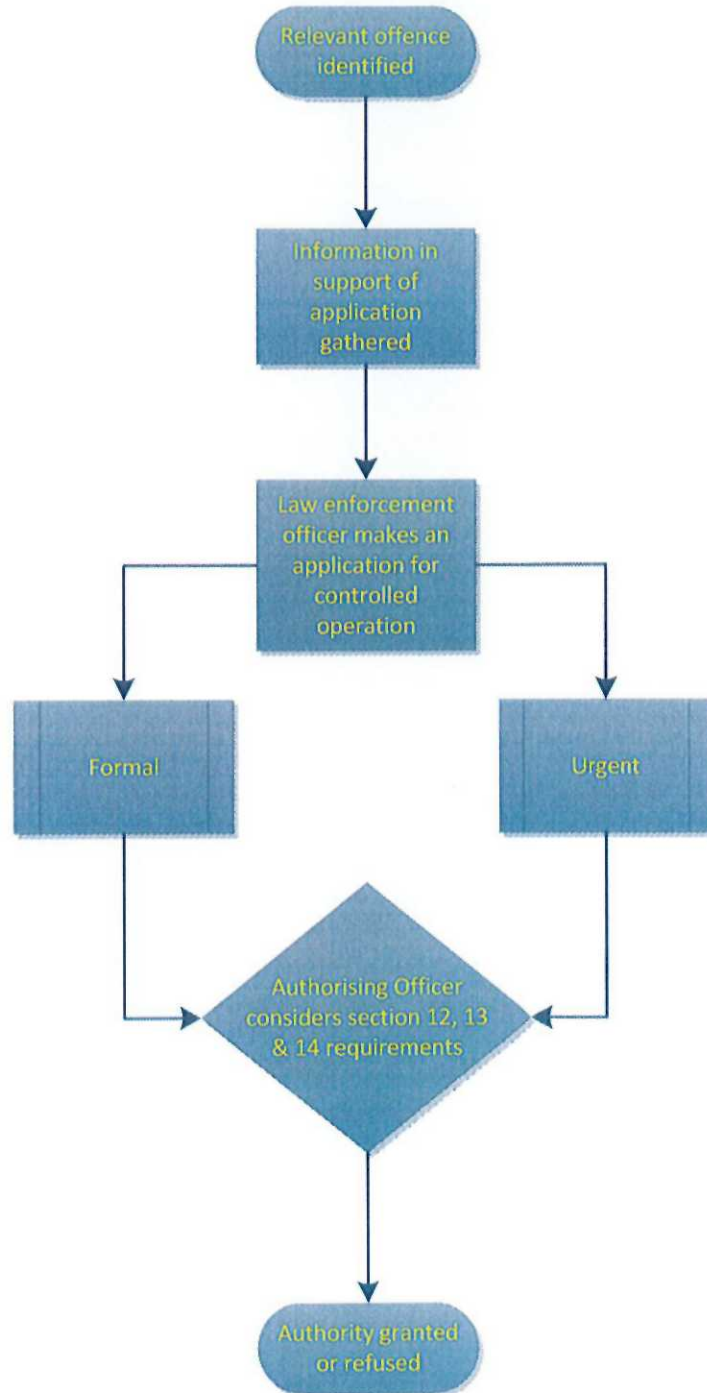
*A key legal principal is that the culpability of an offender may be diminished if the actions of the law enforcement officers or authorities operate to induce the offender to commit an offence which otherwise might not have been committed (although it remains the fundamental task of the court to evaluate the criminality involved). It may be accepted that a mitigating factor might be that the offender was led by a participant in the operation into committing a more serious offence than otherwise might have been committed.<sup>2</sup>*

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<sup>2</sup> Ombudsman NSW - *Law Enforcement (Controlled Operations) Act 1997* Annual Report 2011-2012

## Authorisation Process Flow chart

[12] The authorisation process can be shown visually as below:



## Cross Border Controlled Operations

[13] The Act allows for controlled operations to be authorised in Western Australia which may, if necessary, be continued across territorial borders

of other participating jurisdictions. In return, other jurisdictions may have their controlled operations recognised by Western Australia. This may be done without re-applying to the new jurisdiction for permission to carry out controlled operations.

[14] The Act recognises corresponding controlled operation laws of the Commonwealth. However, Western Australian controlled operations authorities are only recognised in other jurisdictions if that state or territory has first recognised the WA Act as corresponding legislation. The Acts recognised by the Western Australian legislation are:

(a) *Crimes Act 1914* (Cth) - Part IAB

- AFP, Police force of State/Territory, Customs, ACC, ACLEI

(b) *Crimes (Controlled Operations) Act 2008* (ACT)

- AFP, ACC

(c) *Law Enforcement (Controlled Operations) Act 1997* (NSW)

- NSW Police, ICAC, NSWCC, PIC, AFP, ACC, Customs

(d) *Police Powers and Responsibilities Act 2000* (Qld)

- Qld Police, CMC

(e) *Criminal Investigation (Covert Operations) Act 2009* (SA)

- SA Police

(f) *Police Powers (Controlled Operations) Act 2006* (Tas)

- Tas Police, ACC

(g) *Crimes (Controlled Operations) Act 2004* (Vic)

- Victoria Police, IBAC



## RESPONSIBILITY OF AGENCIES UNDER THE ACT

- [15] The impact controlled operations have on a person's right to privacy, highlights an organisation's obligation to transparency and accountability. The Act recognises these obligations in the following ways:

### **Within the Agency**

- [16] Accountability for the powers in the Act starts within the relevant agency. Following the stringent considerations required by the application and authorising officers; the Principal Law Enforcement Officer (usually the applicant) is required to submit a report within two months of the completion of the controlled operation to the Chief Officer of that agency.

- [17] Section 36 of the Act is specific in the aspects that must be reported to the Chief Officer. These include the following:

- (a) Date and time when the operation was commenced and concluded.*
- (b) Whether the operation was cross-border or local.*
- (c) The nature of the controlled conduct engaged in for the operation.*
- (d) Details regarding the outcome of the operation.*
- (e) If illicit goods were involved; the nature and quantity of the goods and the route which they travelled.*
- (f) Details of any loss or serious damage to property or personal injuries sustained during the operation, whether direct or indirect.*
- (g) Whether any unlawful conduct was undertaken for the purposes of the operation.*
- (h) Were any persons given permission for unlawful conduct under the Act.*
- (i) Were any variations made to the authority and whether they extended the specified time period.*
- (j) Were any retrospective or urgent authorities granted.<sup>3</sup>*

- [18] On receiving the above reports, the Chief Officer is required to submit a bi-annual report to the Corruption and Crime Commission as soon as reasonably practicable after 30 June and 31 December. As well as a summary of the information enclosed in the Principal Law Enforcement Officer's report, the Chief Officer must also include:

- (a) the number of formal and urgent authorities granted, varied or refused by the agency;*

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<sup>3</sup> *Criminal Investigation (Covert Powers) Act 2012*

(b) the number of authorities cancelled by the agency; and

(c) a breakdown of the above authorities into cross-border and local operations.<sup>4</sup>

### **Regulation**

- [19] The Act stipulates the Commission must undertake a compliance function with regards to agencies entitled to carry out controlled operations. Under the Act, the Commission is required to inspect their records no less than once a year to establish the extent to which officers of that agency have complied with the Act.
- [20] The Act grants the Commission appropriate powers to ensure these inspections may be completed.
- [21] As 2013 marked the year in which the above compliance function took effect, a compliance plan was required.
- [22] The Commission held meetings with the three involved agencies and discussed their requirements to comply and report under the Act and the Commission's compliance function.
- [23] Finally, prior to commencing the first inspection, the Commission prepared a compliance check sheet highlighting the possible risks for the relevant agencies in meeting their requirements.

### **Notification to Parliament**

- [24] When the Commission has received all Chief Officers reports, the Act provides that the Commission prepare an annual report for the Minister and all concerned Chief Officers of each law enforcement agency, as soon as practicable after 30 June each year, for controlled operations completed over the preceding 12 months.
- [25] The report must include, for each law enforcement agency, comments by the Commission on the comprehensiveness and adequacy of the report.
- [26] The report must not include information likely to endanger any person's safety, prejudice an investigation or compromise tactics or methodologies employed by a law enforcement agency.
- [27] Following the Commission's assessment and recommendations, the report must be laid before Parliament by the relevant Minister within 15 days of receiving the Commission's report.

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<sup>4</sup> *Criminal Investigation (Covert Powers) Act 2012*



## INSPECTION OVERVIEW

- [28] The 2012-13 year marked the implementation of the Act which came into effect on 1 March 2013. As such, the following figures are based on the preliminary period 1 March 2013 to 30 June 2013 with comparisons to commence in the next reporting period.
- [29] Currently the DOF are required to report controlled operations under this legislative requirement.
- [30] DOF did not to commence any controlled operations within the period and thus none have been concluded.
- [31] Given the short time period that the legislation has been active, DOF are in the process of confirming their application process with a senior WAPOL officer. The DOF have two operations proposed which are awaiting application.
- [32] As part of the Commission's inspection role, visits to the relevant agencies were conducted, where an understanding of the authorisation process was obtained.
- [33] Although the DOF had informed the Commission they had not applied for any controlled operations at the end of the period, they had two applications ready for submission and as such it was agreed to inspect their process thus far.
- [34] Each application was inspected to ensure it met the criteria as set out in section 10 of the Act, including: the applicant was a law enforcement officer; it distinguished whether it was a formal or urgent application and it provided information on which the application could be granted.
- [35] Evidence was sought that the Authorising Officer would consider the criteria set out in section 12 of the Act prior to approval and this came in the form of an Authorising Officer's checklist.
- [36] Section 39 of the Act further sets out record keeping procedures. The files relating to controlled operations were examined to ensure they either contained the following files or that DOF were aware of complying with the following requirements:
- (a) *Each application made by a law enforcement officer of the agency;*
  - (b) *Each authority granted to a law enforcement officer of the agency;*
  - (c) *Each variation application made by a law enforcement officer of the agency;*
  - (d) *Each variation of authority granted or made by the authorising officer for the agency;*
  - (e) *Each order cancelling an authority granted to a law enforcement officer of the agency;*

*(f) Each retrospective authority granted under section 25 and details of the application and authority to which the retrospective authority relates;*

*(g) Each report of a principal law enforcement officer of the agency under section 33(1) or 36.<sup>5</sup>*

[37] All law enforcement agencies are also required under section 40 of the Act to maintain a general register. The general register was inspected to ensure it met the criteria. The information held in the general register is obtained from the application, authorisation, cancellation and PLEO report.

### **Outcome of Inspection**

[38] Under section 41 of the Act, the Commission must inspect the records maintained by a law enforcement agency, no less than once every 12 months to ensure compliance with the Act. Inspections were carried out at all agencies governed by the Act.

[39] The DOF currently keeps and maintains their own records relating to controlled operations. The DOF have taken legal advice with regards to their obligations under the Act. Based on the Commission's inspection, the DOF is complying with the requirements of Part 2 of the Act.

[40] Based on the inspection, the Commission is satisfied that the DOF are providing good records of their activities, providing a reasonable basis to suspect an offence on which the controlled operation is to be carried out; as well as being aware of the matters to be taken into account by the authorising officer and addressing these matters prior to submission of their application.

### **Chief Officers' Reports**

[41] As per section 38(5) of the Act the Commission must comment on the comprehensiveness and adequacy of the reports provided by the Chief Officer of each law enforcement agency as per section 37 of the Act.

[42] Due to the recent introduction of the Act, the DOF report for the 2012-13 year were limited.

[43] The report received from DOF consisted of a covering letter format with an attached table addressing each of their reporting obligations along with a relevant response.

[44] In the Commission's view, DOF met all their reporting requirements under the Act.

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<sup>5</sup> Criminal Investigation (Covert Powers) Act 2012

## NOTIFICATIONS

- [45] Section 26 of the Act states that the Commission must be notified within 7 days of a retrospective authority being granted.
- [46] As at 30 June 2013 no retrospective authorities had been granted by any agency.
- [47] Section 36 of the Act requires that the Principal Law Enforcement Officer provide a report detailing the outcome of each operation as well as other detailed information within 2 months of its conclusion.

### DOF

- [48] As at 30 June 2013, DOF had not completed any controlled operations and therefore this requirement is non-applicable.



## **AMENDMENTS TO LEGISLATION**

- [49] There were no amendments to legislation during the 2012-2013 reporting period.